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"We the People" and Our Enduring Values

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THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES. By *Akhil Reed Amar.* New Haven: Yale University Press. 1997. Pp. xi, 272. $30.

> Let me give you a lesson in American history: James Madison never intended the Bill of Rights to protect riffraff like you.[1]

Akhil Amar[2] chides legal scholars for believing that the current system of criminal procedure, both substantive and remedial, is constitutionally compelled. He writes, "Scholars should know better, but too few of those who write in criminal procedure do serious, sustained scholarship in constitutional law generally, or in fields like federal jurisdiction and remedies" (p. 115). Amar believes, as I do,[3] that criminal procedure has been impoverished by its failure to connect to "larger themes of constitutional, remedial and jurisdictional theory" (p. 115). But as one who has done serious, sustained scholarship in all the areas Amar mentions — or so I like to think — I have grave concerns about Amar's first principles and their remedial implications. As an admirer of his work in the field of federal jurisdiction, I have been deeply puzzled by his treatment of the Fourth, Fifth, and Sixth Amendments, which is fundamentally at odds with his attitude toward the substantive and remedial structure of the remainder of the Constitution.

My thesis is that Amar has been led astray by the very fact that these amendments *are* about criminal procedure. His attitude toward crime and criminals has led him to conclude that the first principles underlying the criminal procedure amendments are the protection of the innocent and the pursuit of truth. Indeed, he conflates even these two principles, so that the pursuit of truth becomes

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1. J.B. Handelsman, NEW YORKER, Aug. 13, 1990, at 35 (caption in cartoon depicting judge talking to defendant).

2. Southmayd Professor of Law, Yale Law School.

3. *See* Susan Bandes, *Taking Some Rights Too Seriously: The State's Right to a Fair Trial,* 60 S. CAL. L. REV. 1019, 1020-21, 1053 (1987).

another way of saying that the innocent must be sorted from the guilty. Amar's monolithic focus on protecting the innocent is wrongheaded as a matter of constitutional text, history, structure, and spirit. It has led him to make startling claims about the reach of the Fourth, Fifth, and Sixth Amendments and the remedies that ought to flow from their violation.[4]

It is important to examine Amar's claims carefully for a number of reasons. First, Amar is absolutely correct about the need to discuss the values animating constitutional criminal procedure. Amar's ambition is nothing less than to "fundamentally reorient the field" (p. ix). He is energetic and fearless in his determination to examine a concededly ingrown, contradictory, and polarized field from a fresh perspective. He seeks to take nothing for granted, and he does succeed in raising hard questions about some of the Warren Court's conventional wisdom. It seems *de rigeur* to refer to Amar's analysis as provocative,[5] and surely he would not excite so much critical comment if he had not hit a nerve. Amar deserves appreciation for taking great intellectual risks. He is correct that it is time to take a long, careful look at the current state of criminal procedure and ask whether we are comfortable with the values and interests it embodies, whether it is a workable system, and where it fits in the greater constitutional scheme.

Second, it is important to respond to Amar's substantive analysis because it rests on assumptions that are disturbingly ascendant in current criminal jurisprudence. Amar's analysis must be critiqued for its misidentification of the values of innocence and truth seeking as animating the criminal procedure amendments, its focus on ultimate disposition and away from process, its unworkable remedial proposals, and its consistent undervaluing of the concern with the abuse of governmental power. Ironically, despite Amar's sense of his scholarship in this area as revolutionary, the same values and assumptions he espouses have increasingly informed the Court's criminal procedure jurisprudence. In my opinion, this ap-

4. For example, he advocates jettisoning the warrant and probable cause requirements in favor of a flexible reasonableness analysis that he argues would permit more direct recognition of the innocence-protecting, truth-seeking values he espouses — and then jettisoning the exclusionary rule for violations of this reasonableness standard. Pp. 31-45. He advocates admitting virtually all physical fruits of compelled testimony because of their reliability, and compelling criminal suspects to testify in pretrial hearings. P. 47. He comes perilously close to suggesting that the right to counsel is a right against erroneous conviction of the innocent, rather than a right belonging to all those accused of crime. Pp. 138-41.

5. *See* Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down That Wrong Road Again,"* 74 N.C. L. REV. 1559, 1562 (1996); Yale Kamisar, *On the "Fruits" of* Miranda *Violations, Coerced Confessions, and Compelled Testimony,* 93 MICH. L. REV. 929, 930 (1995); Tracey Maclin, *When the Cure for the Fourth Amendment is Worse Than the Disease,* 68 S. CAL. L. REV. 1, 1 (1994); Carol S. Steiker, *Second Thoughts About First Principles,* 107 HARV. L. REV. 820, 821 (1994).

proach signals a deeply unfortunate turning away from "enduring values that Americans can recognize as *our* values" (p. 155).

Finally, it is important to respond to Amar's analysis because *it is Amar's analysis.* He is a highly respected legal scholar with a well-deserved reputation for brilliant iconoclasm. His early works advocated a generous and attractive vision of full remediation for governmental wrongs, and indeed this theme recurs in his current work. Yet, despite his stated desire to integrate the criminal procedure amendments into the Constitution as a whole, his vision for these amendments is far less generous or attractive. More accurately, its superficial attractiveness lies in its appeal to simplicity and "common sense" — dangerous attributes when they jibe so neatly with the reflexive us/them attitude that too often pervades debate in this area. In practice, Amar's proposals would weaken greatly the substantive and remedial structure undergirding the Fourth, Fifth, and Sixth Amendments. Amar has testified in Congress and elsewhere on these issues, advocating, among other things, an end to the exclusionary rule.[6] Such testimony coming from one viewed as a liberal, civil libertarian law professor is extremely powerful — and extremely troubling. Thus, the disjunction between Amar's views on protections for noncriminal litigants and his views about criminal defendants must be illuminated.

I. "We the People" and Our Enduring Values

Amar's chapter on the future of constitutional criminal procedure contains a key paragraph about his interpretive vision for this field:

> A Constitution proclaimed in the name of We the People should be rooted in enduring values that Americans can recognize as *our* values. Truth and the protection of innocence are such values. Virtually everything in the Fourth, Fifth and Sixth Amendments, properly read, promotes, or at least does not betray, these values. [p. 155]

This paragraph cries out for the punch line: "What do you mean, *we?*" I do not mean this comment glibly. Amar's assumptions about what *we* value, and indeed about who *we* are, are deeply problematic. Amar claims, here and throughout the book, to be describing societal values that are both deeply rooted in history and at the core of contemporary concerns. To the extent he roots his claim for enduring values in the concerns of the Founders, his historical analysis is unpersuasive. It suffers from precisely the same flaw as does his analysis of the contemporary factors shaping the evolution of the criminal procedure amendments: it consistently underplays or even denigrates the concern for the abuse of govern-

6. *See Senate Committee Considers Replacing Exclusionary Rule with Civil Remedy,* 56 Crim. L. Rep. (BNA) 1545-47 (Mar. 15, 1995).

mental power. This concern is *our* value in the sense that it animated the framers, and in the sense that it has endured. The exclusive focus on truth and innocence reads out the values of fairness, judicial integrity, equality, and, most of all, the political concern for the abuse of government power that — I will argue — are the enduring values we do and should recognize as *our* values.

When Amar fails to include the fear of abuse as one of *our* enduring values, it is important to understand how he defines the "We." He consistently uses the phrase "We the People" to describe *innocent people,* as, for example, when he suggests that instead of excluding tainted evidence, damages ought to be assessed to comfort victims of violent crimes, which would "be more apt to make the people 'secure in their persons, houses, papers, and effects' than would freeing murderers and rapists."[7] There is "We the People," and then there are the criminals.

There are a number of problems with a theory of criminal procedure that rests on separating the innocent from the guilty and ensuring that innocent people are protected and guilty people are not. Even assuming that truth and innocence are the values that belong at the pinnacle of the hierarchy, Amar makes several errors. He employs a simplistic, whodunit version of the concept of innocence. In addition, although he identifies the pursuit of truth as a primary value, he conflates the pursuit of truth with the protection of innocence. Finally, his chronology is problematic: he assumes that innocence can be determined prior to determining what protections are due.

A. *When Truth and Innocence Are Overrated*

> [T]he thing is, you don't have many suspects who are innocent of a crime. . . . If a person is innocent of a crime, then he is not a suspect.
>
> —Remarks of Attorney General Edwin Meese[8]

In exalting the value of innocence protection, Amar has signed on to one of the fastest growing, and most dangerous, trends in contemporary criminal jurisprudence: the trend toward separating the innocent from the guilty *before* determining what protections to afford. Taken to its logical extreme, it has the potential to gut constitutional protection for those accused of crime.

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7. P. 29. In Akhil Reed Amar, *The Bill of Rights as a Constitution,* 100 YALE L.J. 1131, 1180 (1991), Amar says that "the core rights of 'the people' were popular and populist rights — rights which the popular body of the jury was well suited to vindicate," as opposed to countermajoritarian rights. As I will discuss later, this assessment bodes ill for the protection of unpopular groups such as those accused of crime, as well as racial minorities and the poor. *See infra* text accompanying notes 134-39.

8. *Quoted in Reagan Seeks Judge with "Traditional Approach,"* U.S NEWS & WORLD REP., Oct. 14, 1985, at 67.

Consider the Fourth Amendment. In a group of cases in the late 1970s and early 1980s dealing with the definition of a search and the requirements for standing — a group of cases that Amar calls "one sensible corner of current Fourth Amendment law" (p. 112) — the Court transformed the *Katz v. United States*[9] reasonable expectation of privacy test into a *legitimate* expectation of privacy test. Whereas *Katz* itself had found a reasonable expectation of privacy in the contents of a phone call, despite the fact that the call concerned illegal gambling activities, *United States v. Jacobsen*[10] and *United States v. Place*[11] put a moral spin on the reasonableness standard. These cases held that a suspect had no legitimate expectation of privacy in illegal activity — that he could assert a Fourth Amendment claim only to the extent that the government intruded on his noncriminal activities. In *Rawlings v. Kentucky,*[12] the Court held that a suspect had no legitimate possessory interest in contraband and thus could not complain about the seizure of that contraband, though he was ultimately convicted of its possession.[13]

In short, the question of whether a defendant can claim Fourth Amendment protection now hinges on whether the defendant can show, at the outset, that his noncriminal activities were intruded upon. The focus is squarely on the nature of the interest asserted, rather than on whether society ought to tolerate the techniques police use to intrude upon these "illegitimate" interests.[14]

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9. 389 U.S. 347 (1967).

10. 466 U.S. 109, 121-22 (1984).

11. 462 U.S. 696, 701-02 (1983).

12. 448 U.S. 98, 104-06 (1980).

13. John Burkoff refers to this result as a classic example of Orwellian doublethink. *See* John M. Burkoff, *When Is a Search Not a "Search?" Fourth Amendment Doublethink,* 15 U. TOL. L. REV. 515, 535-37 (1984).

14. *See* United States v. Jacobsen, 466 U.S. at 140-41 (Brennan, J., dissenting); *see also* United States v. Payner, 447 U.S. 727 (1980) (refusing, for lack of standing, to review a government sting operation that included hiring a female private detective to entertain a Bahamian bank official so that IRS agents could steal his briefcase, photocopy over 400 documents, and use the contents against the suspect). The Court's refusal to suppress the evidence in *Payner* came despite the fact that the sting was organized precisely to take advantage of the fact that neither man would have standing to challenge the misconduct. *See* 447 U.S. at 742-43 (Marshall, J., dissenting); Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition?"* 16 CREIGHTON L. REV. 565, 636-38 (1983) (condemning the *Payner* decision on these grounds); *see also* Whren v. United States, 116 S. Ct. 1769 (1996) (refusing to adopt a rule against pretextual searches); Oliver v. United States, 466 U.S. 170 (1984) (permitting unregulated searches of open fields on suspect's property by focusing on the suspect's reasonable expectations, rather than the need to control police intrusions); United States v. Morrison, 449 U.S. 361 (1981) (holding that, absent prejudice, dismissal of indictment was inappropriate though investigator's meeting with defendant outside counsel's presence and suggestion that defendant retain different counsel was a deliberate violation of the Sixth Amendment); United States v. Noriega, 764 F. Supp. 1480 (S.D. Fla. 1991) (holding that conduct of law enforcement officers in eavesdropping on conversations between defendant and his counsel was not reversible error absent prejudice).

Amar approves of this line of cases[15] because it advances the value he identifies as most important: protecting the innocent. He would call these police actions searches and seizures, but would find them reasonable because he believes reasonableness incorporates the "common sense" intuition that the Fourth Amendment protects law abiding citizens and victims, not criminals. He says:

> And the reason these searches were reasonable is that, although they could ruin a drug runner's day, they posed little threat to the privacy interests of law abiding folk. Lawbreakers *as such* have no *legitimate* interest in privacy, and are at times entitled to less peace of mind than are the law-abiding. [pp. 112-13]

Whether the introduction of the evidence is achieved through narrow definitions of search, expansive definitions of reasonableness, or eviscerating the exclusionary rule, each of these paths leads to the same troublesome destination: a belief that it is possible and desirable to identify the guilty prior to trial — and indeed prior to the suppression ruling — and to deny them the right to complain about governmental misconduct.[16] This belief is based on a credulous acceptance of the possibility of intruding only upon the "illegitimate" interests of guilty suspects and a recasting of the criminal procedure amendments as personal rights of the good guys. The case law exhibits a utopian — or dystopian — faith in the possibility that technology can find ways to discern only illegal activities, without intruding upon legitimate privacy expectations — a faith apparently unshaken by technology's failure to rise to the challenge,[17] or by the danger of post-hoc justification. Indeed, as Justice Brennan

15. To be precise, he does not approve of classifying the police actions as "nonsearches" and "nonseizures." He calls current definitions of search and seizure narrow and "unjustified" (p. 19) and argues in favor of expanding them in order to bring more conduct within the Fourth Amendment. He would, however, uphold the searches and seizures as reasonable. In addition, he would not exclude the fruits of such searches, even if the searches were found unreasonable, because "contraband or stolen goods . . . were never one's property to begin with. . . ." P. 22.

16. As the Red Queen said: "Sentence first — verdict afterward." LEWIS CARROLL, ALICE IN WONDERLAND 137 (Grosset & Dunlap, Inc., 1946) (1865).

17. The dog sniff cases provide an illustration of the fallibility of methods designed to expose only illegal interests. In *United States v. Lyons,* 957 F.2d 615 (8th Cir. 1992), the court confronted the case of a drug-detecting dog who became agitated and tore the package in two, spewing the contents on the floor and ingesting cocaine. The court determined that the dog's conduct could be likened to a "natural occurrence" and could not be attributed to the police — thus, no search had occurred. There have also been numerous cases in which such dogs have badly bitten their quarry, and one in which a dog killed a burglary suspect. *See* David G. Savage, *When Bites Are Worse Than Barks,* A.B.A. J., Sept. 1996, at 38; Robinette v. Barnes, 854 F.2d 909 (6th Cir. 1988). Even if the "sniff" goes as planned, moreover, it cannot be separated neatly from the intrusions that accompany it. *See* United States v. Place, 462 U.S. 696, 710 (1983) (holding that seizure of luggage during 90-minute wait for dog to arrive was unreasonable); Doe v. Renfrow, 451 U.S. 1022 (1981) (Brennan, J., dissenting from denial of cert.) (arguing that dog sniff of high school students is an unconstitutional search). *See also* Kamisar, *supra* note 5, at 960-64 (advocating that intrusion must be evaluated in light of entire chain of events).

pointed out, the focus on the illegitimate product of the search threatens the fundamental principle that "[a] search prosecuted in violation of the Constitution is not made lawful by what it brings to light."[18]

On a similar note, in his discussions of *Gideon v. Wainwright*[19] and the right to counsel in both the Fifth and Sixth Amendment contexts, Amar makes plain his belief that the only true purpose of supplying counsel is to ensure that the innocent are not wrongly convicted. In the Fifth Amendment self-incrimination context, his concern is with the possibility of an unreliable confession — one elicited from a defendant who is actually innocent. He believes that out-of-court protections should be keyed to minimizing this danger. Thus, he advocates a supervised, civilized "deposition approach" to interrogation, coupled with compulsion for suspects to talk truthfully (pp. 76-77).

Though Amar's proposals in the Fifth and Sixth Amendment contexts diverge significantly from current law, the seeds are there. The ever-expanding notion of harmless error reflects the belief that so long as the trial verdict correctly separates the innocent from the guilty, constitutional error during the trial need not be addressed.[20] Recently, in *Arizona v. Fulminante,*[21] the Court even extended harmless error analysis to the admission at trial of coerced confessions. *Strickland v. Washington*[22] held that ineffective assistance of counsel is not reversible error unless it likely affected the outcome of the trial. Innocence appears to be on an inexorable rise to the top of the values hierarchy — *except,* ironically, when to recognize innocence would expand, rather than contract, the rights of defendants.[23]

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18. *Jacobsen,* 466 U.S. at 140 (Brennan, J., dissenting) (quoting Byars v. United States, 273 U.S. 28, 29 (1927)); *see also* United States v. Di Re, 332 U.S. 581, 595 (1948) (holding that a post-hoc justification for a search is impermissible). Amar notes with at least a hint of approval that at common law, ex post facto success was a complete defense to an unlawful search or seizure. P. 7.

19. 372 U.S. 335 (1963).

20. *See* Chapman v. California, 386 U.S. 18 (1967) (rejecting rule that all constitutional violations constitute reversible error); *see also* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 27.6 (2d ed. 1992) (discussing harmless error doctrines); Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error,* 88 COLUM. L. REV. 79 (1988) (critiquing Supreme Court's harmless error jurisprudence); Daniel B. Yeager, *Categorical and Individualized Rights-Ordering on Federal Habeas Corpus,* 51 WASH. & LEE L. REV. 669, 709 (1994) ("Between 1967, when the Court decided *Chapman v. California,* and 1991, when it decided *Arizona v. Fulminante,* the range of constitutional trial errors forgivable on appeal went from none to nearly all.").

21. 499 U.S. 279 (1991).

22. 466 U.S. 668 (1984).

23. *See, e.g.,* Herrera v. Collins, 506 U.S. 390 (1993) (holding that absent exceptional circumstances a claim of actual innocence is not by itself sufficient reason for a federal court to entertain a habeas petition, because it does not rise to the level of a constitutional claim); *see*

In this section, I will discuss two major objections to identifying innocence as one of our core values. First, Amar's conception of innocence is simplistic and unworkable, and his belief in the possibility of sorting the innocent from the guilty before determining what process is due is both unrealistic and ill-advised. Second, there are serious normative problems with claiming innocence-protection as a core constitutional value — either historically or currently.

The first step in illustrating the dangers of enshrining innocence is to examine Amar's use of the term. Amar treats innocence essentially as the question of "did he do it or not?" The innocent in his world are those who did not commit murders, rapes, armed robberies, and other violent crimes: those who are or could be threatened by the murderers and rapists.[24]

There are several problems with basing an overarching theory of criminal procedure on such notions of innocence. First, notice that Amar's paradigmatic guilty person is a murderer or other violent felon. Indeed, the murderer's bloody knife appears again and again in the pages of this book.[25] Yet empirical data indicates that the exclusionary rule that is the target of many of Amar's policy arguments has almost no negative impact on the prosecution of these violent crimes. To the minimal extent that evidence is suppressed, suppression occurs most often in drug cases.[26]

Second, as the reach of criminal law expands, it becomes more and more difficult to isolate Amar's paradigmatic innocent person. In 1954, Professor Louis Shwartz observed, "The paradoxical fact is that arrest, conviction, and punishment of every criminal would be a catastrophe. Hardly one of us would escape, for we have all at

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also Susan Bandes, *Simple Murder: A Comment on the Legality of Executing the Innocent,* 44 BUFF. L. REV. 501 (1996) (discussing *Herrera*).

24. The book is replete with comments like: "even a good lawyer cannot always save an innocent but unpersuasive-sounding client from being demolished on the stand," p. 85; "even an innocent person may say seemingly inculpatory things under pressure and suspicion and when flustered by trained inquisitors," p. 71; "indictments can at times be laced with technical legal language that an accused person — especially, perhaps, if wholly innocent (say, in a case of mistaken identity) — may not understand," p. 139; and "to throw out highly reliable evidence that can indeed help us separate the innocent from the guilty — and to throw it out by pointing to the Constitution, no less — is constitutional madness," p. 155.

25. *See, e.g.,* pp. 26, 30, 160.

26. *See* Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests,* 1983 AM. B. FOUND. RES. J. 611, 614-15, 637-38; Yale Kamisar, *"Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule,* 86 MICH. L. REV. 1, 26 n.120, 27-28 (1987); Maclin, *supra* note 5, at 44; *see also The Jury and the Search for Truth: The Case Against Excluding Relevant Evidence at Trial: Hearing on S. 3 Before the Senate Comm. on the Judiciary,* 104th Cong. 143 (1995) [hereinafter *Hearing*] (statement of Prof. Thomas Y. Davies) (positing that if similar statistics were available and analyzed today, they would reflect an even lower number of lost arrests, due to the more flexible probable cause standard and the good faith exception).

one time or another committed acts that the law regards as serious offenses."[27] The difficulties in remaining "innocent" have multiplied in the past several decades. The Court permits various intrusions, including custodial arrest, for a host of minor traffic infractions, such as driving with a burned-out tail light or license plate light, failing to signal a turn, driving seven miles over the speed limit, or having a loud muffler.[28] Cars may be pulled over at sobriety checkpoints.[29] Even pedestrians are not exempt from the long arm of the law.[30] The growing administrative state offers numerous opportunities to violate regulatory statutes.[31] Homes may be searched for faulty wiring,[32] students may be searched for cigarettes,[33] and back yards may be surveilled for marijuana plants.[34] Can any one of us confidently claim long-term innocence in the face of so many opportunities to become a lawbreaker?[35]

Finally, even if we confine the conversation to the paradigmatic violent felon, the hurdles are insuperable. For one, Amar's view ignores the degrees of culpability and the degrees of punishment that must be assessed in, for example, a homicide investigation. Michael Seidman said it well:

> Since ultimate truths, even of the factual variety, are notoriously elusive, separating the innocent sheep from the guilty goats can be a difficult task. Moreover, much of the system's time and effort is often diverted from this task to the infinitely more subtle and intractable job of differentiating between types of goats. *Even if the defendant is guilty, the questions remain how guilty he is and what we should do with him.*[36]

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27. Louis B. Schwartz, *On Current Proposals to Legalize Wire Tapping,* 103 U. PA. L. REV. 157, 157 (1954).

28. *See* Carol M. Bast, *Driving While Black: Stopping Motorists on a Subterfuge,* 33 CRIM. L. BULL. 457, 482-86 app. A (1997). *See also* David Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment,* 1997 SUP. CT. REV. 271, 298-99 (observing that because almost everyone violates traffic rules sometimes, this means that the police, if they are patient, can eventually pull over anyone they are interested in questioning).

29. *See* Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990).

30. *See* Norimitsu Onishi, *Giuliani Crows as Theft Suspect is Caught on Jay Walking Charge,* N.Y. TIMES, Feb. 21, 1998, at B1 (jaywalker unable to produce identification was brought to station, found to be a robbery suspect, placed in a lineup, and booked).

31. *See* New York v. Burger, 482 U.S. 691 (1987).

32. *See* Camara v. Municipal Court, 387 U.S. 523 (1967).

33. *See* New Jersey v. T.L.O., 469 U.S. 325 (1985).

34. *See* California v. Ciraolo, 476 U.S. 207 (1985).

35. Moreover, even those who have broken no law at all are at risk of being subjected, albeit mistakenly, to overbearing police tactics. *See, e.g.,* Bob Herbert, *Reprise of Terror,* N.Y. TIMES, Mar. 12, 1998, at A25 (recounting two completely mistaken police intrusions on the same day in each of which the police conduct was shocking and egregious).

36. Louis Michael Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure,* 80 COLUM. L. REV. 436, 441 (1980) (emphasis added).

A defendant who unquestionably has committed a homicide may be exonerated for acting in self-defense or convicted of voluntary or involuntary manslaughter. What, for example, would Amar do with a case like *Spano v. New York?*[37] Spano, a 25-year-old, unsophisticated, emotionally unstable immigrant with a poor command of English, was indicted for capital murder. *Spano* did not involve strong-arm tactics that led to a false confession. The defendant really did kill the deceased, and eyewitness testimony was available to corroborate his confession. Instead, the case involved unconscionable police tactics which overbore the defendant's will, including lying and betrayal by a police officer who he thought was his close friend, repeated denials of his requests to see his attorney, and nearly twelve hours of incessant nighttime questioning. *Spano* showed the value of a confession to law enforcement — it enabled prosecutors to add to their homicide case Spano's statements that the deceased was always "on his back," "always pushing" him, and that he was "not sorry" he had shot him. What might have been voluntary manslaughter or even self-defense could now be prosecuted successfully as first-degree murder. Is there room in Amar's world view for gradations of factual innocence, or does the fact that Spano really did shoot and kill a man irrevocably categorize him as guilty?

Amar's attitude toward factual innocence reminds me of a question that countless laypeople asked me when I was an appellate defender: how could I defend people I knew were guilty? An example I often used to illustrate the difficulty of "knowing" whether my clients were guilty, despite the fact that they had all been convicted of felonies, was my defense of Rosa Bennett. Ms. Bennett was a battered woman who unquestionably had shot and killed her husband. Ms. Bennett testified that her husband had come home drunk and had physically and verbally abused her over a period of several hours. In doing so, he tore and bloodied her sweatshirt. In fear for her life, she shot him. The state claimed that, contrary to Bennett's assertion, it did not have in its possession her torn and bloodied sweatshirt that would have corroborated her claim that her husband had attacked her. Indeed, the state's case rested on the lack of any physical evidence supporting Bennett's claim that she had acted in self-defense. Fortunately, an inventory slip revealed that the state indeed had taken the sweatshirt from the crime scene. The Illinois Appellate Court reversed her conviction.[38] Even so, Bennett was not ultimately found "factually innocent." She was convicted of voluntary manslaughter rather than murder and was released from prison immediately rather than

37. 360 U.S. 315 (1959).

38. *See* People v. Bennett, 402 N.E.2d 650 (Ill. Ct. App. 1980).

serving several additional years. Does she fall into the group of law-abiding innocents whom Amar finds worthy of protection, or is she one of the lawbreakers who receive such benefits as right to counsel and right to discovery only as an unavoidable byproduct of their provision to the law-abiding?

The descriptive problems with identifying the innocent are accompanied by another obstacle: the chronology problem. At what point should it be determined who are the innocent who are worthy of constitutional protection, and who are the guilty who are unworthy? It is often impossible, as it was with Rosa Bennett or Joseph Spano, to separate the effects of evidentiary rulings from the ultimate degree of guilt or innocence. The difficulty of making this determination at the outset was one salient lesson of the evolution from *Betts v. Brady*[39] to *Gideon v. Wainwright,*[40] an evolution of which Amar speaks with approval (p. 140). Because Clarence Earl Gideon had a retrial, with counsel, in which witnesses were adequately cross-examined and the jury was introduced to the state's burden of proving guilt beyond a reasonable doubt, it was possible to determine that he had been wrongly convicted in his first trial.[41] How will we ever know whether Betts was wrongly convicted?[42] The concept of guilt or innocence gives no guidance in determining his need for counsel. Amar and the current Supreme Court would agree that a *Gideon* violation cannot be harmless error, but they both miss the larger lesson — that the concept of innocence provides no coherent measure of what procedures ought to be followed pretrial or at trial.

Amar claims innocence as a core value of the framers as well as of contemporary society. Yet Amar's conception of innocence is especially ironic and troubling because it is so relentlessly apolitical and ahistorical. The colonists whose victimization led to the Revolution were, for the most part, *guilty as charged.* They did smuggle molasses for the manufacture of rum as well as other contraband, and they did violate the seditious libel laws. Their factual innocence was hardly the source for the outrage of the colonists.

39. 316 U.S. 455 (1942).

40. 372 U.S. 335 (1963).

41. *See* ANTHONY LEWIS, GIDEON'S TRUMPET 234-50 (Vintage Books 1989) (1964).

42. In an article in the 1962 University of Chicago Law Review, Professor Kamisar took a fascinating and extensive look at the record of the Betts trial. He found the record to be rife with error — suggestive lineup, failure to exclude witnesses from the courtroom while other witnesses testified, possible fabrication of evidence, ambiguous identification, failure to summon key subpoenaed witnesses, and more. In addition to error, the record reflects innumerable lost opportunities to make a stronger defense — failures to call certain witnesses, failures to cross-examine, Betts's own decision not to take the stand, failures to object to evidence, and Betts's questionable decision to use an alibi defense, among others. *See* Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused,* 30 U. CHI. L. REV. 1, 42-56 (1962).

The outrage stemmed from official repression and abuse — in the way the crimes were defined, in the way investigations were conducted, and in the way convictions were obtained. Perhaps Amar would like to argue that those were political dissidents, not *real criminals* like our current rapists and murderers, and that therefore they were entitled to protections to which current real criminals are not entitled. But he makes no case for the claim that the concern for official lawlessness animating the Founders differs in kind from the concern for official lawlessness that continues to affect our society today.[43]

What degree of liberty would our citizens — including our less powerful citizens — experience under Amar's proposals? The dangers of Amar's focus on innocence are well illustrated by the widespread problem of racially and sexually discriminatory law enforcement. Amar makes a powerful claim for his proposals — that they will better enable questions of racial and sexual discrimination to be taken seriously (p. 150). But if this is the goal, his analysis will have — to use his phrase — an "upside-down effect" (p. 28). As I will discuss in detail below, the Court currently uses innocence as a way of avoiding questions of racial pretext, discriminatory enforcement, bad faith, sexual harassment, and other forms of official abuse. The focus on innocence is a very poor means of achieving equality of treatment; instead, it works to inhibit it.[44]

One final significant problem with the focus on innocence is that it ignores the concept of reasonable doubt. Amar treats the notion of innocence as if it were objectively ascertainable, rather than an often difficult task of sorting out conflicting and ambiguous evidence. Indeed, if factual innocence were as readily ascertainable as Amar suggests, it might raise questions about the need to give the state a handicap. Amar makes statements such as: "[W]e must remember that integrity and fairness are also threatened by excluding evidence that will help the justice system to reach a true verdict" (p.

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43. Consider the words of Professor Louis Schwartz:

> Make no mistake about it. These are not rules for the protection of the innocent alone. They are rules which operate and were intended to operate before anyone could decide whether the suspect was innocent or guilty . . . . Their particular usefulness to the "guilty" is no accident, for many of these rules were written into the Constitution by real "criminals," fresh from experience as smugglers, tax evaders, seditionists and traitors to the regime of George III. Theirs was no mawkish sentimentality for miscreants. They understood, as we must understand, that the law enforcement net cannot be tightened for the guilty without enmeshing the innocent; that decent law enforcement is possible without impairing the bulwarks against injustice and tyranny; and that the worth of a society will eventually be reckoned not in proportion to the number of criminals it crucifies, burns, hangs or imprisons, but rather by the degree of liberty experienced by the great body of its citizenry. There have never been more determined law enforcers than Nazi Germany or the Soviet [Union].

Schwartz, *supra* note 27, at 158.

44. Amar suggests that the reasonableness focus will permit courts to focus on equality of treatment. Here, too, his logic is upside-down. *See infra* text accompanying notes 83-104.

25). What Amar fails to acknowledge is that, given the difficulties and ambiguities of weighing the evidence, and the impossibility of omniscience, a tiebreaker is needed. Further, he simply seems to reject the notion that the tie should go to the defendant — that it is better to let several guilty men go free than to convict one who is innocent.

Amar pays tentative lip service to the state's burden, but he appears uncomfortable with it.[45] Amar does not seem to accept that the state's burden reflects and flows from the recognition that the Bill of Rights exists to help correct a severe power imbalance between the defendant and the awesome power and massed resources of the state.[46] This power imbalance, which Amar recognizes and decries in every other area of scholarship,[47] is invisible in his work on criminal procedure. The world he describes here is one in which the state and the defendant are on an equal footing in the contest to establish the truth.[48] Indeed, any burdens and presumptions that do exist should work in favor of the prosecution:

> Given the almost metaphysical difficulties in knowing whether the bloody knife or some evidentiary substitute would have come to light anyway, should not the law strongly presume that somehow, some way, sometime, the truth would come out? Criminals get careless or cocky; conspirators rat; neighbors come forward; cops get lucky; the truth outs; and justice reigns — or so our courts should presume, and any party seeking to suppress truth and thwart justice should bear a heavy burden of proof. [pp. 26-27]

This quotation brings us face to face with, not just Amar's conception of innocence, but his conceptions of truth and justice. Let us turn to an examination of truth, and its interactions with innocence and justice, in Amar's hierarchy of values.

Amar says that the pursuit of truth and the protection of innocence are the first principles animating the Fourth, Fifth, and Sixth Amendments. But when he talks about the pursuit of truth, it becomes clear that it, too, is merely a subsidiary of the primary value — protecting the innocent. For example, he refers to "the basic trial value of truth seeking — sorting the innocent from the guilty" (p. 3). He criticizes "modern doctrines that — in the name of the Constitution, no less — exclude evidence the public knows to be true" (p. 119). He goes on to say that "the gap between public truth and truth allowed in the courtroom can demoralize the public,

45. *See, e.g.*, p. 142 ("Counsel's line here is a fine one — between asking questions that imply factual innocence and asking questions that merely imply reasonable doubt — but, in principle, a workable one.").

46. *See* Wardius v. Oregon, 412 U.S. 470, 480 (1972) (Douglas, J., concurring); Bandes, *supra* note 3, at 1032.

47. *See infra* notes 105 and 106 and accompanying text.

48. *See* Bandes, *supra* note 3, at 1022-31.

whose faith in the judicial system is a key goal of the public trial ideal" (p. 119); and again: "Truth and accuracy are vital values. A procedural system that cannot sort the innocent from the guilty will confound any set of substantive laws, however just. And so to throw out highly reliable evidence that can indeed help us separate the innocent from the guilty . . . is constitutional madness" (p. 155).

Thus, truth, accuracy, and reliability seem to possess no identity independent of their service to the ideal of protecting the innocent. Truth becomes another way of asking whether the suspect really did what he is accused of doing. Each trial is an individual exercise in assuring that the correct person is put behind bars — nothing more.[49] Amar's equation of this exercise with the public interest is especially interesting, because it suggests that societal values are affirmed by a just conviction. This comment in itself would not be startling, but there is no counterbalancing recognition that the public interest is served by any values that do not promote sorting the innocent from the guilty.

Let's examine these values in the context of the jury trial. If the sole duty of the trier of fact were to establish factual innocence, then the jury would not be the best body to perform this duty. The jury symbolizes societal willingness to risk nonconviction for the sake of other values. One such value is the community's ability to mete out justice or exercise mercy on a local level. If the trier of fact were expected merely to weigh the proof and apply the law, a judge would be able to perform this duty at least as well as a jury. Amar recognizes this. He talks at length of the colonists' distrust of magistrates, for example, and their preference for juries, who, presumably, would nullify the oppressive laws of the Crown.[50] He says the proper response to crime is not merely good factfinding but moral judgment by the community via the jury (p. 124). The question then becomes, if a jury trial is important for reasons other than determining factual innocence, what are those reasons?

Perhaps Amar addresses this issue by his use of the phrase "normative innocence," which he defines as "I did it, but I did not thereby offend the public's moral code," in contrast to "factual innocence," which he defines as "I didn't do it" (p. 90). But it is difficult to tell what "normative innocence" encompasses. If the phrase encompasses values that provide a counterweight to factual inno-

49. In the criminal context, Amar seems oddly derisive of the idea that the trial serves a public norm-creation function. See, for example, his discussion of the "Leavenworth lottery," pp. 157-58, discussed *infra* at text accompanying notes 178-180.

50. Pp. 11-12. He also argues that the jury is less corruptible than the judge, and that fear of judicial corruption was a major reason for the colonial preference for jury trials. P. 121. Tracey Maclin argues that Amar's history is incomplete and selective and that the vast majority of colonial judges refused to issue writs in the face of demands by the Crown, though it meant risking their livelihood. *See* Maclin, *supra* note 5, at 21-25.

cence, such as all the moral, political, visceral, and other community values a jury might bring to bear, does this also lead to a concept of normative truth — a truth which is moral and political, as well as factual? If so, how does Amar square this with his evident faith that guilt and innocence are objectively ascertainable? Moreover, if finding the truth becomes a moral rather than a factual search, which might lead to acquitting a factually guilty person because of government oppression, then why should this idea of truth not encompass other nonaccuracy values, such as the need to exclude oppressively gained evidence to preserve judicial integrity?

Amar talks frequently about evidence the public knows to be true or that will help the justice system reach a true verdict. He does not come to terms with some essential truths about the trial-related rights — that they set up hurdles for the government in order to attempt to counterbalance the threat of overzealous government prosecution, that they create a risk of nonconviction for the sake of process rights,[51] that these process rights must inhere across the board in order to ensure both justice and the appearance of justice, and that norms are created that transcend the particulars of individual cases. Truth is just one of the values encompassed by justice. As for truth itself, we should remain wary of those who claim special access to it.

B. *The Values Animating Our "Profoundly Anti-government"[52] Constitution*

Amar's scholarship on the criminal procedure amendments was published as a series of articles before becoming a book. The article on the Fourth Amendment in particular,[53] and the Fifth Amendment article to a lesser extent,[54] have elicited substantial critical commentary.[55] Articles by Donald Dripps, Yale Kamisar, Tracey Maclin, and Carol Steiker take varied approaches to assessing

51. *See, e.g.*, Conner v. The Commonwealth of Pennsylvania, 3 Binn. 38 (Pa. 1810) ("The suggestion that the party might escape is not of the least importance; it might be made in any case, and thus turned into an instrument of the grossest oppression. The Constitution prefers the escape of ten culprits, to the adoption of a practice which might lead to the imprisonment of one innocent man." Therefore, the warrant must be based on probable cause and oath or affirmation.).

52. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 353 (1974).

53. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994).

54. Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self Incrimination Clause*, 93 MICH. L. REV. 857 (1995).

55. *See supra* note 5 (listing articles). Amar's article on the Sixth Amendment, Akhil Reed Amar, *Foreword: Sixth Amendment First Principles*, 84 GEO. L.J. 641 (1996), was published shortly before this book's publication. I therefore suspect the reactions to the Sixth Amendment work will come in the form of book reviews rather than responses to the article.

Amar's work. Each is must reading for those who wish to evaluate Amar's approach to criminal procedure — including his historical analysis, his assessment of the development and state of current doctrine, his political and policy choices, his jurisprudence, and his methodology. Despite their differing approaches, the articles sound one common theme: that a great, and perhaps fatal, weakness in Amar's analysis is its failure to confront the fact that the criminal procedure amendments are meant to control governmental abuse and overreaching.

As I have indicated, I share this view. In his focus on innocence, Amar reads a host of precious values out of the Constitution. Many of these values serve to address the inequality of power between the government and the individual and the need to curtail abuse of that power. Amar is well aware of the governmental oppression that shaped the Constitution. In noncriminal contexts, as I will discuss below, governmental accountability is one of Amar's highest values. But in the criminal context, he finds it too easily trumped by another value: getting the bad guys.

Amar rests his conclusion that law enforcement interests trump concerns for governmental abuse on the following reasoning. First, he assumes that the interests of the prosecution and the defendant are on par,[56] an assumption that fails to confront the difference between the rights of the defendant, which are constitutionally enshrined, and the interests of the prosecution, which are not. Second, he unfairly weights the interest in prosecution by assuming that it is congruent with the interests of society, or "the people."[57] In doing so, Amar makes some peculiar assumptions about who "the people" are and how the people's trust and confidence should be earned. He assumes that "the people" is an entity completely separate from those accused of crime. Indeed, he seems to assume that "the people" gain when all the evidence comes out and when the guilty are put behind bars. He says, for example: "[w]hen the murderer's bloody knife is introduced, it is not only the government that profits; the people also profit when those who truly do commit crimes . . . are . . . convicted" (p. 26). But the presumption of innocence, evidentiary protections, the concern for judicial integrity, and the control of governmental misconduct are all societal interests. Except for those as sure as Amar that they can identify the bad guys and that the bad guys are not us, these protections them-

56. *See, e.g.*, p. 25 ("[W]e must remember that integrity and fairness are also threatened by excluding evidence that will help the justice system to reach a true verdict.").

57. He adds the "rights" of victims to this side of the equation as well. *See, e.g.*, p. 26 ("When rapists, burglars, and murderers are convicted, are not the people often *more* 'secure in their persons, houses, papers and effects?'").

selves increase societal trust and confidence in the fair and evenhanded administration of the criminal justice system.[58]

Amar's focus on innocence and what he calls truth-seeking impedes recognition of many of these values. Evidentiary rules exclude substantial amounts of evidence that are "true" and "accurate" in some sense of the words, but which are inflammatory, prejudicial, irrelevant, or redundant.[59] Exclusion often serves values other than truth and accuracy. This is particularly true of Fourth Amendment exclusionary rules, which, as Seidman says, pose the pure case for the efficacy of truth-denying rules.[60] But it is also true of the dignitary concerns underlying the right against self-incrimination[61] and the assurance of fair trials for *all* defendants contained in the Sixth Amendment.[62] Respect for the autonomy and dignity of the accused, the assurance of fair and evenhanded processes, concern for the integrity and accountability of the institutions that administer criminal procedures — these are all *truth-disabling values* at times. They impede, and are intended to impede, the government from doing all it can to put the guilty behind bars, at least when the government attempts to do so in derogation of other values.

Amar would not be particularly disturbed by my objection. Indeed, his whole point is that the values that impede truth-seeking are the wrong values, precisely because they impede truth-seeking. Unfortunately, even apart from the questionable and controversial historical and doctrinal support he garners for his argument and even apart from his failure to account for the vast changes in society in general and police practices in particular since the time of the framers, and even apart from the violence his proposals would do to dignity, autonomy, and evenhanded process, Amar's proposals should also be faulted because they will not achieve much of what he himself wants to achieve. Let us assess his proposals in light of

58. As I have observed elsewhere, the legitimacy of the jury system, historically, depended in large part on the good opinion of those whose cases it adjudicated. If the jury system maintained the appearance of justice in the eyes of the accused, it was more likely that the community would accept its decisions as just. *See* Bandes, *supra* note 3, at 1046; *see also* Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 552 (1975).

59. *See* U.S. v. Quasar, 671 F.2d 732 (2d Cir. 1982) (unfair prejudice may be present when inflammatory or otherwise shocking physical evidence or photographs are offered); *see also* U.S. v. Bowers, 660 F.2d 527 (5th Cir. 1981).

60. *See* Seidman, *supra* note 36, at 449.

61. *See* Murphy v. Waterfront Comm., 378 U.S. 52, 55 (1964) (stating that privilege reflects many of our fundamental values and noble aspirations, including our desire to protect against statements elicited by inhumane treatment, our sense of fair play and our respect for the inviolability of the human personality and each individual's right to lead a private life).

62. *See* Duncan v. Louisiana, 391 U.S. 145, 158 (1968) (stating that the right to a jury trial is essential for preventing miscarriages of justice *and* for assuring that fair trials are provided for all defendants).

the dignity and judicial integrity values to which he assigns a low priority, as well as in light of the equality value he holds dear.

1. *Dignity*

Amar's proposals denigrate dignity in both expected and unexpected ways. Predictably, they are based on a lack of concern for the dignity of the "guilty." But in addition, they would promote widespread assaults on the dignity of society at large.

Assuming for the moment that the innocent can be sorted neatly from the guilty, one deeply troubling aspect of Amar's elevation of innocence is its corollary: that the guilty are not entitled to protection. In my view, every human being is entitled to some dignity.[63] Even someone who has murdered in cold blood is entitled to a lawyer at his trial to ensure fair process, a warrant before his home is searched to ensure reason for the intrusion, warnings before he decides whether to confess to ensure free will and lack of coercion, and, at bottom, the recognition that he is still a part of the human community. Amar, as I understand it, simply disagrees with the proposition that the guilty are entitled to dignity by virtue of their humanity.[64] At that level of disagreement, the Constitution and the Federalist Papers can advance the conversation only so far.

Ironically, Amar's proposals would also damage the dignity of those he seeks to protect. Amar briefly acknowledges that his reasonableness regime brings the danger of "too much arbitrariness and ad hoc-ery, unbounded by public, visible rules . . ." (p. 38). His solution to the problem is that "a broader search is sometimes better — fairer, more regular, more constitutionally reasonable . . ." (p. 38). This is precisely the reasoning behind the ever-growing category of special needs searches, extending governmental invasions of privacy to high school athletes, customs employees, railroad employees,[65] members of the President's cabinet[66] and others not usu-

63. *See* Susan Bandes, *Empathy, Narrative, and Victim Impact Statements,* 63 U. CHI. L. REV. 361, 412 (1996).

64. Amar does recognize that forcible pumping of a suspect's stomach "without sufficient justification is horribly wrong." P. 251 n.43. Of course, the "sufficient justification" escape hatch raises questions about what Amar would consider adequate justification for forcible stomach pumping. Apparently, he advocates an ad hoc reasonableness inquiry in these cases, too. He would allow judges to weigh the invasiveness or humiliation of the examination or act against the gravity of the charged offense and the importance of the evidence to the prosecution's case. P. 83. Under such criteria, it seems likely that Professor Maclin is correct that the *Rochin* holding itself might not survive. *See* Maclin, *supra* note 5, at 52-53 (discussing Rochin v. California, 342 U.S. 165 (1952)).

65. *See* Skinner v. Railway Labor Executives' Assn., 489 U.S. 602 (1989); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

66. See ROBERT REICH, LOCKED IN THE CABINET 46 (1997) for an amusing description of the urine test administered to the Secretary of Labor.

ally considered part of the "criminal class,"[67] without the requirement for individualized suspicion or a warrant. Amar would like to extend this reasoning beyond special needs cases, to cases in which criminal activity is suspected.[68] He suggests that if such searches land disproportionately on certain groups, such as poor persons or persons of color, the government may claim that such groups are also disproportionate *beneficiaries* of the scheme, because the search is designed to reduce their risk of victimization.[69] Thus, Amar advocates widening the net that will enmesh both innocent and guilty. In evaluating Amar's proposals, we should recall Professor Shwartz's warning that "the worth of a society will eventually be reckoned not in proportion to the number of criminals it crucifies, burns, hangs or imprisons, but rather by the degree of liberty experienced by the great body of its citizenry."[70] Most of all, we should recall the words of Justice Jackson, written three years after he returned from prosecuting the Nuremberg defendants:

> [O]ne need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of [Fourth Amendment] rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.[71]

2. *Abuse of Power*

Amar is derisive about the values of judicial integrity and fairness, which he calls a "slogan [which] sits atop a pile of dubious assumptions and inferences" (p. 25). Amar discusses these values

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67. *See* Note, *"Special Needs" and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule,* 32 HARV. C.R.-C.L. L. REV. 529, 541-42 and nn.96-100 (noting that lower courts have permitted suspicionless drug testing of emergency medical technicians, Federal Bureau of Prisons employees, certain Department of Education employees, Detroit police officers, and airline industry employees in safety-sensitive positions). Scott Sundby makes an insightful point in this regard. He argues that the very category of special needs searches is a shift from the usual presumption of innocence: it permits government "to treat citizen as rule-breaker even in the absence of a fair probability that the citizen is not obeying the law." Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?,* 94 COLUM. L. REV. 1751, 1799 (1994).

68. P. 32 (calling the present regime "upside down."). Special needs searches have already been extended to some criminal investigations. *See* Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990) (permitting sobriety checkpoints).

69. This reasoning was properly rejected in *Pratt v. Chicago Hous. Auth.,* 848 F. Supp. 792 (N.D. Ill. 1994) (holding the CHA housing sweeps violative of the Fourth Amendment). If a group desires to be searched, each member of the group is free to consent to a search. It is only the powerless, however, who have to choose between rampant crime and the wholesale waiver of constitutional rights. *See* Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) ("Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent.").

70. Schwartz, *supra* note 27, at 157, 158.

71. Brinegar v. United States, 338 U.S. 160, 180-81 (1949) (Jackson, J., dissenting).

and their impact on the exclusionary rule in a section entitled "Modern Moves" (pp. 25-31). The discussion is revealing both for what it says and for what it leaves unexamined. Amar discusses judicial integrity and fairness solely in the context of the exclusionary rule, and thus he dismisses them in part because other American civil courts and criminal courts in other countries do not use the rule but do not lack integrity (pp. 25-31). But judicial integrity and fairness are not just "slogans" or "moves" to defend the exclusionary rule; they are both important values in their own right, and aspects of a larger concern animating the Constitution: concern about lawless and abusive governmental tactics.

Amar treats judicial integrity as a purely symbolic concern — and one we can no longer afford to honor. He treats it as if it exists in a vacuum, unconnected to police abuse. I will discuss Amar's consistent practice of isolating and atomizing governmental conduct in more detail in the next section. Here is one excellent example of how it works: Amar can dismiss the need for exclusion of tainted evidence because he focuses solely on the ultimate product of the trial, which he views as the verdict. He fails to focus on the entire chain of governmental conduct and misconduct at issue.[72] Then he defines his task as determining which is more harmful to the acceptability of the verdict, the use of tainted evidence at trial or the failure to convict one whom the people know to be guilty. But evidence does not spring fully formed into the courtroom. It was obtained through police misconduct on the street, and often makes its way to court through additional police misconduct as well as the misconduct of other governmental agents. Police sometimes coerce confessions, make wrongful searches, write false police reports, or fail to turn over exculpatory evidence, and then lie, both out of court and in court, about having done so.[73] Such police conduct is repugnant regardless of whether it affects the innocent or the guilty. The court's use of evidence obtained through police misconduct compromises the fairness and integrity of the trial. The judicial use of tainted evidence not only fails to condemn governmental lawlessness but also encourages it to continue, by sending the clear message that the evidence is welcome and will increase the chances of conviction.

Why police misconduct is not repugnant in its own right, even when it is directed at the guilty, is an issue Amar never confronts directly. For example, he says:

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72. Kamisar makes this point powerfully in his critique of Amar and Lettow's proposal to admit the fruits of compelled statements. *See* Kamisar, *supra* note 5, at 960-64; *see also* Amar & Lettow, *supra* note 54.

73. *See* Bandes, *supra* note 23, at 514-15 & nn.73-76.

> Once we realize, as did the Founders, that we must provide deterrent remedies for innocent citizens, we can put an analytically proper remedy in place, and exclusion is no longer necessary to deter. And, not coincidentally, our proper remedial scheme will be right side up, making innocent citizens whole and denying guilty defendants windfalls. [p. 138]

In other words, there is simply no need to deter police from illegally searching or seizing the guilty — if the guilty avoid subjection to such illegal police conduct as a byproduct of the protection of the innocent, then they receive a windfall.

Nor does Amar explain why police misconduct should be laundered by placing it in the hands of court personnel. He elides the fact that the very use of tainted evidence has serious consequences that are both symbolic *and* pragmatic. It threatens both the equitable stance of the court and the appearance of justice, thus compromising the court's authority to pass judgment on the lawless. As the Supreme Court observed, "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard for the charter of its own existence."[74] As Justice Holmes similarly observed in his famous dissent in *Olmstead,* "[N]o distinction can be taken between the Government as prosecutor and the Government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed."[75]

But this concern is not merely symbolic. The refusal to condone police misconduct provides a judicial check on the continuation of the unconstitutional behavior.[76] The judicial use of wrongly obtained evidence, conversely, has the real world effect of encouraging the police to continue breaking the law, because it gives them every incentive to do so.[77] Even in Amar's universe of values, this is a highly problematic result, because such lawbreaking will not be confined to the guilty. But in addition, Amar's willingness to condone a judicial system comfortable with the use of illegal evidence helps explain his dismissive attitude toward "fairness." He sees it as a process value which is important only when it affects the innocent. His approach is firmly fixed on the bottom line — the reliability of the conviction, the search, the confession, and little concerned with

74. Mapp v. Ohio, 367 U.S. 643, 659 (1961); *see also* Elkins v. United States, 364 U.S. 206, 222-24 (1960).

75. Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

76. *See* Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General,* 88 COLUM. L. REV. 247, 282 (1988).

77. *See infra* text accompanying notes 150-172.

the way in which the conviction, the contraband, or the confession is obtained.

The same bottom-line approach characterizes his Fifth and Sixth Amendment analysis. His overriding concern about confessions is with their reliability, and the means by which they are obtained seem to concern him most when they impinge on reliability. His concern about the right to counsel is with ensuring vindication of the innocent, and his argument for the right contains no theoretical support for the notion that all accused persons are entitled to counsel. It would have been interesting to see a more nuanced treatment of some of the attorney misconduct issues that often arise. For example, it is unlikely that Amar would object to improper closing arguments, or perhaps even shoddy and unprepared counsel, where there was sufficient independent evidence of guilt. He describes the importance of a public trial in terms of factfinding, in terms of normative judgment toward the accused, and in terms of the education of jurors. But he barely mentions its importance in terms of safeguarding the fairness of the process and in preserving the appearance of justice (p. 122).

The right Amar recognizes is, simply put, the right not to be wrongly convicted. Safeguards governing the conduct of police investigative techniques or the conduct of trial carry little weight unless they can be shown to have affected this ultimate right. The argument is, taken to its logical conclusion, an efficiency argument — one that devalues process and all that process protects, and asks only whether the correct result was achieved.[78]

Amar's singular focus on the ultimate right is exemplified by his high regard for the inevitable discovery and independent source doctrines, to which he complains that courts have given "too little rein."[79] These doctrines are premised on the assumption that the

78. Although Amar says he breaks with Judge Posner's "crude cost-benefit analysis" (p. 35 and n.168), he does not explain how his theories stop short of Judge Posner's efficiency model, *see, e.g.,* Hessel v. O'Hearn, 977 F.2d 299 (7th Cir. 1992). Indeed, in his analysis of how a remedy would work in the speedy trial context, Amar argues that a guilty person who was wrongly incarcerated pretrial but who would eventually be incarcerated posttrial deserves no remedy, because his detention "does not appear to have caused any incremental deprivation of liberty." P. 111 (referring to Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971)). This reasoning recalls one of the cruder examples of Judge Posner's application of economic principles to constitutional values: his argument that the victim in *DeShaney v. Winnebago County Dept. of Soc. Servs.,* 812 F.2d 298 (7th Cir. 1987), had no right violated, as he "would probably have been no better off if the negligent caseworker had never intervened; he would simply have been beaten into a vegetative state by his father that much earlier." Archie v. City of Racine, 847 F.2d 1211, 1225 (7th Cir. 1988) (Posner, J., concurring). *See also* Susan Bandes, *The Negative Constitution: A Critique,* 88 MICH. L. REV. 2271, 2290 (1990).

79. P. 156 (arguing for expansion of the inevitable discovery doctrine in the Fourth Amendment context). *See also* p. 60-61 (arguing that in the Fifth Amendment context, law should establish an irrebuttable presumption that the truth and the fruits of compelled testimony would have come to light anyway).

police should be put in the position they would have been in had they not violated the Constitution, as it is more important to solve crimes than to create disincentives for police misconduct.[80] Would Amar's theories not validate a confirmatory search,[81] for example, on the theory that the police could have obtained a warrant, and therefore should not be penalized for conducting a warrantless search in order to save the time it would take to go downtown? Would they not validate knowing and repeated improper closing arguments by a prosecutor, so long as the evidence against the defendant was overwhelming in each case? Would they not validate threats of violence calculated to elicit a confession, if independent reliable evidence of the defendant's guilt existed? Do they not adopt Justice Powell's position in *Kimmelan v. Morrison*,[82] that the failure to object to illegally seized but reliable evidence does not constitute ineffective assistance of counsel? If not, Amar has not explained why not.

3. *Equality*

Amar's tendency to downplay or ignore the concern with police misconduct leads to many of his most troubling, and normatively unattractive, "big ideas."[83] Most troubling of all, it directly interferes with one of his dearly held goals — to promote equality of treatment.

Amar's proposal to replace the requirements for warrants and probable cause with a reasonableness regime is a case in point. Amar's use of textualism takes him to a very odd place. He reasons that the colonists feared judges above all, and that therefore they

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80. *Cf.* Murray v. United States, 487 U.S. 533, 542 (1988) (adopting the independent source doctrine, based on the rationale that while government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied); Nix v. Williams, 467 U.S. 431, 441-44 (1984) (adopting the inevitable discovery doctrine, based on the rationale that police should not be put in a worse position than they would have occupied absent their unlawful conduct); Donald Dripps, *Living with* Leon, 95 YALE L.J. 906 (1986) (arguing that the deterrence rationale requires that government illegality *should* place government in worse position than it would otherwise have occupied). Indeed, as Professor Kamisar points out, Amar's and Lettow's Fifth Amendment argument to admit all physical fruits of coerced confessions would actually put the police in a *better* position than they would have been in, absent their misconduct, since it would admit the fruits regardless of whether they would have been discovered in any event. *See* Kamisar, *supra* note 5, at 1004.

81. A confirmatory search is a warrantless search conducted by police in order to determine whether it is worth the trouble to get the requisite warrant. *See Murray*, 487 U.S. at 547 (Marshall, J., dissenting) (discussing confirmatory searches). Amar comes close to approving confirmatory searches. P. 26.

82. 477 U.S. 365, 396 (1986) (Powell, J., concurring).

83. *See* p. 65 ("What's the Big Idea?"); *see also* Akhil Reed Amar, *The Fifty-Seventh Cleveland-Marshall Lecture: The Bill of Rights and Our Posterity*, 42 CLEV. ST. L. REV. 573, 585 (1994) (discussing the importance of finding "the big idea," or core concept, underlying constitutional provisions).

did not mean to elevate the judicial warrant requirement (pp. 10-17). Rather, they meant to give power to juries (pp. 10-17). Amar has been criticized for his reading of history and for his on-again, off-again textualism.[84] But even apart from these grave problems with his analysis, he makes some outrageous leaps. He reasons that because the warrant requirement was not very important to the framers, neither was the probable cause requirement that is nested in the same clause. Therefore, the linchpin of the Fourth Amendment must be the other clause — reasonableness. He accuses supporters of probable cause of "doubly flawed logic," but this is precisely the problem with his own reasoning. He uses his misreading of the historical importance of the warrant clause to "drag[ ] along its yoked mate, the probable cause requirement"[85] — or drag them both down together, to be precise.

Once Amar has disposed of the Warrant Clause and the probable cause requirement,[86] he argues that a reasonableness regime would accomplish a number of goals. He argues that it would allow a more calibrated notion of what searches ought to be permitted. For example, more serious crimes might require less reason for intrusion (p. 33). A reasonableness regime would permit the interests of victims to be placed in the balance (pp. 37-38). It also would allow the jury to do much of the balancing, because "the jury is perfectly placed to decide, in any given situation, whom it fears more, the cops or the robbers."[87] On top of all that, a reasonableness regime would allow us to deal more openly and honestly with questions of race and gender discrimination (p. 38).

Amar is undoubtedly correct that a reasonableness regime would encourage more of a sliding scale, more balancing, more concern for victims, and more room to factor in fear of robbers, or respect for cops. But all this is a good thing only for someone who

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84. *See* Maclin, *supra* note 5, at 4-25; Steiker, *supra* note 5, at 826-30.

85. P. 18. Tracey Maclin's article contains an excellent and extended rebuttal to Amar's historical arguments against the importance of the warrant clause. *See* Maclin, *supra* note 5, at 10-25; *see also Hearing, supra* note 26, at 133-38 (statement of Prof. Thomas Y. Davies) (refuting Amar's contention that reasonableness was the Framers' core concern).

86. Amar never really explains how he can read them both nearly out of the Fourth Amendment while still taking the text seriously. He explains that the "warrant" and "probable cause" language cannot mean what some scholars claim, because the language does not say, and cannot mean, that warrants and probable cause are required in all cases. *See* p. 152. *See also* Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance,* 30 SUFFOLK U. L. REV. 53, 74-75 (1996). But this is a straw argument. He cites no one who argues that the presumption in favor of warrants should be irrebuttable. *See* Maclin, *supra* note 5, at 5-8. In any case, Amar does not explain the prominence of the language in the text of the Fourth Amendment, nor does he explain the "puzzling persistence of the warrant requirement." Steiker, *supra* note 5, at 847.

87. P. 44. *But see* Steiker, *supra* note 5, at 850 ("[J]uries will almost always fear the robbers more than the cops, but this fact does not necessarily mean that everything the cops do is 'reasonable.'").

believes that the police can be trusted to make these determinations without meaningful prior guidelines. The puzzling question is why someone with Amar's knowledge of and sensitivity toward the Civil Rights era and its legacy would believe such a thing.

Amar cites *Terry v. Ohio*[88] to support his claim that his proposed reasonableness analysis will advance the values of equality. He says it is "probably no coincidence" that *Terry,* which carved out exceptions to the probable cause and warrant requirements, contained "one of the most open discussions of race to date" (p. 37). But in fact, *Terry* is both a cause and a prime illustration of the damage that reasonableness analysis has done to equality values in the Fourth Amendment context. Though *Terry* has been salutary to the extent it has brought street level practices within the reach of the Fourth Amendment, it has been a disaster to the extent its reasonableness analysis has begun doing exactly what Amar advocates: swallowing up the Warrant Clause. Thanks to *Terry* and its progeny, we need not speculate about the effects of a reasonableness regime. We can simply observe that nearly every time the *Terry* balancing methodology has been employed, the needs of law enforcement have outweighed the rights of defendants.[89] We can also note that the street level practices *Terry* sought to regulate through this balancing regime are rife with massive, race-based harassment and abuse.[90] And when the Court has acknowledged racial concerns in this context, it has found pretextual stops[91] or drug courier profiles[92] to be reasonable, without regard to race. Some lower courts have found race to be a reasonable profiling factor in authorizing a *Terry* stop under some circumstances.[93]

Many of the most flagrantly discriminatory abuses of police power take place in the context of traffic stops. These include persistent and notorious patterns of stopping disproportionate numbers of black motorists for minor violations — for example, a

88. 392 U.S. 1 (1968).

89. *See* Maryland v. Wilson, 117 S. Ct. 882 (1997); Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 660-64 (1995); Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 618-33 (1989); New Jersey v. T.L.O., 469 U.S. 325 (1985); INS v. Delgado, 466 U.S. 210 (1984); Pennsylvania v. Mimms, 434 U.S. 106, 109-12 (1977); Adams v. Williams, 407 U.S. 143, 145-50 (1972).

90. *See* Angela J. Davis, *Race, Cops and Traffic Stops,* 51 U. MIAMI L. REV. 425, 428-32 (1997); Elizabeth A. Gaynes, *The Urban Criminal Justice System: Where Young + Black + Male = Probable Cause,* 20 FORDHAM URB. L.J. 621, 625 (1993).

91. *See* Whren v. United States, 116 S. Ct. 1769 (1996).

92. *See* United States v. Sokolow, 490 U.S. 1 (1989); *see also* Michael Higgins, *Looking the Part,* A.B.A. J., Nov. 1997, at 48, 50 (describing airport stops apparently based solely on race or alienage, such as stopping passengers with Arabic-sounding surnames).

93. *See* United States v. Weaver, 966 F.2d 391 (8th Cir. 1992). *But see* City of St. Paul v. Uber, 450 N.W.2d 623 (Minn. Ct. App. 1990) (stating that racial incongruity is not a proper basis for a *Terry* stop). *See also* Sklansky, *supra* note 28, at 317 (arguing that although *Terry* itself made explicit its concern with race, that "theme has largely disappeared from Fourth Amendment law").

burned-out tail light or a failure to signal a lane change — and then finding various pretexts to search their cars or persons for drugs.[94] The Court has declined every opportunity to regulate this misconduct. It has given police wide latitude to make warrantless custodial arrests, refusing to require any local rulemaking on the subject of what sorts of crimes may lead to custodial arrests.[95] It has refused to inquire into whether police conduct was pretextual — that is, whether a reasonable officer would have made an arrest based on the conduct at issue.[96] It has refused to require an officer who has completed a *Terry* stop to inform the suspect that he is free not to answer subsequent questions unrelated to the purpose of the stop.[97] It consistently has reaffirmed that its only concern is whether the officer had the authority to make the arrest or search.[98] In other words, was the motorist guilty of driving with a burned out taillight, or was he not? Was he driving with an expired license or not? If he was not factually innocent of the crime charged, the Court finds no cause to complain about further search.[99]

We also should note that if juries are asked whom they fear more, the cops or the robbers, evidence shows that race will likely figure — to the detriment of minorities — in their decisions about whom to fear and whom to value.[100] For example, the Baldus studies have demonstrated that race plays a significant role in determining which defendants are sentenced to die.[101] There is something chilling about Amar's frequent use of the term "common sense."[102] Experience shows that our folk wisdom about who is "just plain folks" often acts to exclude those who are not "like us."[103]

Of course, these are not results that Amar desires — quite the opposite. But his regime will not protect minorities. His structure simply does not account for police behavior in the real world. Ex-

94. *See* Bast, *supra* note 28; David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked,* 69 IND. L.J. 659, 679-81 (1994); Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect,* 93 YALE L.J. 214, 225-30 (1983).

95. *See* United States v. Robinson, 414 U.S. 218, 224-37 (1973); Gustafson v. Florida, 414 U.S. 260, 263-66 (1973).

96. *See Whren,* 116 S. Ct. at 1772-74.

97. *See* Ohio v. Robinette, 117 S. Ct. 417, 421 (1996).

98. *See Whren,* 116 S. Ct. at 1774; *Robinson,* 414 U.S. at 235.

99. *See Whren,* 116 S. Ct. at 1774; *Robinson,* 414 U.S. at 236. The Court also has raised substantial hurdles to claims of racially discriminatory enforcement. *See* United States v. Armstrong, 116 S. Ct. 1480 (1996).

100. DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 148-49 (1990).

101. *See id.; cf.* McCleskey v. Kemp, 481 U.S. 279, 291 n.7 (1987) (assuming the validity of the Baldus study conclusions); Bandes, *supra* note 63, at 398 n.187.

102. *See* p. 32 (discussing common sense (tort) reasonableness).

103. *See* Michael L. Perlin, *On "Sanism,"* 46 SMU L. REV. 373, 374-75 (1992) (describing the dangers of judging competency and sanity based on "ordinary common sense").

perience shows again and again that preclearance,[104] limits on discretion, and neutral third parties are essential when the opportunities for abuse and discrimination are as rampant as they are on the street. It is true that these safeguards will also act to protect the bad guys — there is no way around it.

II. Amar's Atomistic Constitution

> [T]he Constitution draws its life from postulates that limit and control lawless governments, not postulates that limit and control citizens in their efforts to vindicate constitutional rights.[105]

I have long admired Amar's federal courts scholarship. Perhaps, in retrospect, it was an instance of reading what I wanted to into another's scholarship, but I do not think so. Certain values emanate from Amar's work on government liability: the constitutional mandate for full remediation; the inherent value of constitutional rights — independent of their private law analogues and independent of the will of the majority; the flexible and evolving nature of constitutional norms; the overriding importance of governmental accountability; and the systemic nature of much governmental misconduct, and therefore the need for systemic remedies to combat it.[106] I also have admired Amar's determination to read the Constitution as a whole and to identify its overarching values.[107]

In Amar's treatment of the criminal procedure amendments, these values are lost, or at least very hard to find. Here he seems blinded to the deep structure of the substantive and remedial model he champions elsewhere. The most salient characteristic of his analysis in this area is its tendency toward atomization — of governmental conduct, of the interests of defendants, of remedial options, and ultimately, of the Constitution itself — as Amar's analysis in this area stands in isolation from even his own approach toward the remainder of the Constitution. In this section, I will examine the ways in which Amar's ideas about criminal procedure diverge from the values of connectedness, accountability, full remediation, the inherent value of rights, and an evolving Constitution. I divide the analysis into two sections. The first section argues

104. Amar allows that "[p]reclearance might also help firm up the record of what facts the government had before the intrusion, thereby preventing officials from dreaming up post hoc rationalizations" and that at times prior approval from a "more neutral and detached decision maker" might be needed to pass constitutional muster. Pp. 38-39. But his baffling proposal is that the decision to require preclearance should be "pragmatic, contingent, and subject to easy revision" and should be based on whether preclearance is reasonable under the particular circumstances. Pp. 38-39. He offers no further details of who would make these decisions, at what point in the proceedings, and based on what actual criteria.

105. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1485 (1987).

106. *See id.*; Amar, *The Bill of Rights as a Constitution*, *supra* note 7.

107. *See, e.g.*, Amar, *supra* note 7, at 1131 (calling for a holistic interpretation of the Bill of Rights and the Constitution).

that Amar views the constitutional rights of the accused — or at least, those he would view as justly accused — as having no inherent value, but instead as worthy of protection only to the extent they jibe with majoritarian preferences. The second section examines his atomistic view of the wrongful conduct these amendments seek to regulate and the remedies that should flow from their violation.

A. *What is the Worth of Unpopular Rights?*

Amar has often spoken with admiration of the principles embodied in the cases of *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*[108] and *Ex Parte Young.*[109] For example, in *First Principles,* Amar advocates "a Section 1983/*Ex Parte Young*/*Bivens* model featuring before-the-fact prevention via injunctions and after-the-fact compensation and deterrence via damages" (p. 115). Amar explained that the major achievement of *Bivens* and *Young* was their recognition of the self-executing nature of the Constitution, and therefore of the Court's power to infer a damage action directly under the Constitution.[110] He lamented the fact that the promise of *Bivens* was only partially fulfilled, as it permitted only a suit against individual, possibly judgment-proof, officers and not against the governmental entity, though "a *governmental* wrong . . . seems naturally to call for *governmental* liability."[111]

Why was it so important for *Bivens* and *Young* to recognize the self-executing nature of constitutional rights, and what precisely is it that these cases recognized? Prior to *Bivens,* the only damage remedy generally provided for unconstitutional searches was a private trespass suit against the agent.[112] The other possible source of a damage suit was a statute, though it is well known that there was no federal statutory cause of action available to Webster Bivens.[113] The importance of *Bivens* and *Young* was twofold. It flowed from their recognition that, first, the constitutional right itself has inherent value, apart from its incidental congruence with common law or private law protections (pp. 106-07), and second, the constitutional right has value apart from the willingness of an elected legislature

108. 403 U.S. 388 (1971). Amar cites *Bivens* 14 times in the *First Principles* book alone. *See* pp. 29, 41, 110-11, 115, 139, 180 n.4, 193 n.139, 194 n.151, 199 n.209, 209, 210, 236 n.78, 237 n.86, 239 n.111, 252 n.48.

109. 209 U.S. 123 (1908).

110. *See* Amar, *supra* note 105, at 1507-08.

111. *Id.* at 1507-08.

112. *See id.* at 1506-07.

113. *See Bivens*, 403 U.S. at 410 (1971) (Harlan, J., concurring) ("For people in Bivens' shoes, it is damages or nothing.").

to grant it statutory protection.[114] The problem with the cases, as both Amar and I have pointed out, is that the recognition is incomplete — the Court is too tied to the private law model to create the enterprise liability that would provide full remediation and the most effective assurance of governmental accountability.[115]

In light of Amar's admiration for the *Bivens* principle, it is surprising to find that his views of the criminal procedure protections paint a considerably less generous portrait of the worth of the underlying rights and the need for full remediation. What is the worth of the rights of the accused? Oddly, Amar heaps a host of conditions on the recognition of these rights. These conditions are directly antithetical to the ideals of *Bivens*. In fact, several of them are in conflict with the very notion of the Constitution as a countermajoritarian document that will safeguard rights despite the popular will. It seems that Amar will assign value to the criminal procedure rights only if at least one of the following conditions is met:

(1) The right jibes with tort or property notions.

(2) The legislature passes a statute recognizing the right.

(3) A jury is willing to compensate the loss of the right.

(4) The remedy for the right is spelled out in the Constitution.

1. *The Right Jibes with Tort or Property Notions*

Amar's reliance on the common law antecedents of criminal procedure is particularly surprising. He uses the Constitution's "background common law principles" both to define the rights involved and to define the proper remedies — specifically, to argue against the exclusionary rule. As to the definition of the right, for example, he argues that tort law, because it is keyed to the invasion of the search itself, "focuses precisely on the scope of the [Fourth Amendment] violation" (p. 158) in a way that our current regime, which focuses on exclusion and deterrence, does not. He argues that the language protecting security in "'persons, houses, papers, and effects' should remind us of the background common law principles . . . [of] the law of tort."[116] He criticizes the exclusionary rule because it is based on no common law antecedents and because

114. *See* Susan Bandes, *Reinventing* Bivens: *The Self-Executing Constitution,* 68 S. CAL. L. REV. 289, 293-320 (1995); *see also* Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword,* 85 HARV. L. REV. 1532, 1540-43 (1972).

115. P. 110. *See* Bandes, *supra* note 114, at 325-34.

116. P. 20 (referring to the language of the Fourth Amendment). *See also* pp. 152-53 (repeating the assertion that the Fourth Amendment conjures up tort law).

"tort law remedies were . . . clearly the ones presupposed by the Framers of the Fourth Amendment."[117]

Yet the central lesson of *Bivens* was precisely counter to these arguments. *Bivens* stated, most famously, that an abuse of power by a governmental agent is different and more serious than a similar abuse by a private person. It rests on the insight that there is a constitutionally significant difference between a trespass, battery, or false imprisonment by a private person and an illegal search or seizure by a government agent, and that both the scope of the right and the nature of the remedy need to reflect that difference.[118] It observed that "[o]ur cases have long since rejected the notion that the Fourth Amendment proscribes only such conduct as would, if engaged in by private persons, be condemned by state law."[119] *Bivens*'s achievement — its recognition of the self-executing Constitution — was made possible by its rejection of the notion of a suit against government as a tort-like proceeding between private parties. Its limitation — its failure to recognize governmental liability — was a product of its vestigial loyalty to the private rights model.

Amar attempts to finesse the inconvenient parts of the tort model — such as its inability to accommodate enterprise liability — by arguing that it must be "supplemented," (p. 159) "translated," (p. 159) and "brought into the twenty-first century" (pp. 29-30). Conveniently for his thesis, he finds that the twenty-first century version of the framers' intent would accord precisely with his proposals. The modern version would account for the vast changes in government, police practices, and race relations since colonial times[120] by upgrading "the civil model rather than inventing out of whole cloth a criminal one" (p. 30). It would compensate the innocent but not the guilty, it would replace the warrant and probable cause requirements with a regime of "common law (tort) reasonableness"[121] and it would permit class aggregation techniques, civil injunctions, a ten percent sentencing discount for defendants with valid Fourth Amendment claims, and enterprise liability, but not the exclusionary rule. Why? Because "[t]he modern-day

117. P. 21. *But see Hearing, supra* note 26, at 133-38 (statement of Prof. Thomas Y. Davies) (offering an interesting historical account of the late appearance of the exclusionary rule).

118. *See Bivens,* 403 U.S. 388, at 392.

119. *See Bivens,* 403 U.S. 388, at 392.

120. *See* Steiker, *supra* note 5, at 830-44. Amar responds to Steiker's point that police are far more organized and dangerous than they were in the 1780s by suggesting that "we should further ask whether violent criminals are also more organized and dangerous." P. 197 n.190.

121. Pp. 32-35. Amar suggests that tort concepts of reasonableness must be understood in the context of constitutional law. He illustrates with examples of how the protections of the First, Fifth, and Fourteenth Amendments should be read in conjunction with the Fourth Amendment. Pp. 35-40. But these illustrations fail to address a basic point — how the constitutional concept differs from the tort concept as to the Fourth Amendment itself.

equivalent of a horse and buggy is a car, not an Andy Warhol poster."[122]

Amar never deals with the evidence — both empirical and anecdotal — that tort remedies have been massively ineffective in cases against police officers. For multiple reasons, including lack of incentive to sue, lack of jury sympathy for defendants, state-law immunities, and the fact that police misconduct often consists of small, incremental violations rather than dramatic episodes, the likelihood of significant damage awards is extremely small.[123] Moreover, even a longstanding series of large settlement awards, totalling tens of millions of dollars a year, has failed to cause cities like New York or Chicago to re-examine their policies on police brutality, or even to discipline the individual officers involved.[124]

Amar advocates the use of minimum presumed damages in Fourth Amendment cases (p. 42). Ironically, the Court's current treatment of presumed damages is grounded in the tort law principles Amar espouses and gives direct evidence of the worth of the rights in a private law context. In *Carey v. Piphus*[125] and *Memphis Community School District v. Stachura,*[126] the Court held that damages could be awarded based not on any inherent or presumed value or importance of constitutional rights, but only on the *actual injury suffered,* with possible consideration of punitive damages in the former case. The actual injury would be measured by . . . tort concepts! If the plaintiff had not suffered a common law harm such as bodily injury, economic or property harm, or emotional distress, he could recover no more than one dollar in nominal damages.

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122. P. 30. Amar turns for support to Lawrence Lessig, *Fidelity in Translation,* 71 TEXAS L. REV. 1165 (1993). P. 194 n.152. Yet Amar's version of fidelity theory as it applies to the Fourth Amendment seems far more limited than both Lessig's own version and Amar's version when dealing with noncriminal constitutional protections. *See, e.g.,* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process,* 95 COLUM. L. REV. 782 (1995) (arguing that fidelity theory is consistent with using the takings clause to create a new cause of action to advance environmental justice, a use of which Lessig explicitly approved); Lawrence Lessig, *Fidelity and Constraint,* 65 FORDHAM L. REV. 1365, 1381-84 (1997) (generally approving Treanor's analysis as a proper application of fidelity theory). Amar himself has argued that the Thirteenth Amendment can be used to create a cause of action against child abuse in a *DeShaney*-type situation, *see* Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to* DeShaney, 105 HARV. L. REV. 1359 (1992), and against hate speech. *See* Akhil Reed Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124 (1991).

123. *See* Meltzer, *supra* note 76, at 272 & n.125, 284; *see also* Amsterdam, *supra* note 52, at 429-30.

124. *See* Deborah Sontag & Dan Barry, *Using Settlements to Gauge Police Abuse,* N.Y. TIMES, Sept. 17, 1997, at A1; Andrew Martin, *Daley Backs Officers in Death of Honduran,* CHI. TRIB., Feb. 5, 1998, § 2, at 1.

125. 435 U.S. 247, 266-67 (1978) (stating that only nominal damages are available for the violation of a constitutional right, absent proof of "actual injury).

126. 477 U.S. 299, 310 (1986) (stating that no compensatory damages are available for the "abstract importance of constitutional rights").

Such is the worth of the right when viewed against the background of state and common law.[127]

2. *The Legislature Passes a Statute Recognizing the Right*

Much of Amar's proposed regime, particularly in the Fourth Amendment context, depends on legislative enactment, as several commentators have noted.[128] One such proposal is enterprise liability (p. 41). Amar makes, as he has elsewhere, a powerful case for the importance of enterprise liability in regulating the police. In addition, Amar wants legislatures to fashion rules delineating the search and seizure authority of governmental officials. Indeed, he announces that legislatures are obligated to do so (p. 43). He also believes that legislatures will be moved to do so when they see governmental entities paying damage awards (p. 41).

The problem is not with the content of the proposals themselves. The problem is that Amar presents them as a package — enact these proposals and jettison the exclusionary rule. The package is not addressed merely to scholars. Not only has Amar written in favor of jettisoning the exclusionary rule, he has testified to that effect before Congress.[129] It may be clear to his scholarly audience that he offers a package. It is unlikely to be clear to congressional foes of the exclusionary rule that Amar's opposition is conditioned on their responsibility, or that of their state counterparts, to enact broad-based remedies like enterprise liability, intrusive remedies like state-level rulemaking, and unorthodox remedies like a ten-percent sentence discount for defendants with valid Fourth Amendment claims — substituting for the other ninety percent a structural remedy that will flow to the benefit of law-abiding citizens. Amar often writes as if lawmakers of all three branches of government enact overarching plans — as if they decide to weaken one protection only when strengthening another. Is it not also possible that lawmakers hostile to criminal defendants will weaken protections across the board?

The other part of the problem is that to assume any of these proposals will be adopted is, to borrow Amar's phrase from another context, "pure fantasy" (p. 157). Amar talks about the twentieth century's "woeful failure to nurture the civil model" (p. 30), but of course he cannot point to a historical period in which such a model was even partially adopted to regulate police, and he cannot explain why the current period — so hospitable to draconian crime preven-

127. *See* Bandes, *supra* note 114, at 331-32.

128. *See* Maclin, *supra* note 5, at 59-65 (criticizing Amar's reliance on legislative action); Steiker, *supra* note 5, at 848-49 (questioning the use of legislative action in Fourth Amendment damage awards).

129. *See supra* note 6.

tion legislation — should be different. As others have pointed out, the history of statutory attempts to regulate police departments has amounted to a "wholesale 'legislative default'" from the inception of professional policing until today.[130] *Mapp* held the exclusionary rule applicable to the states only when they utterly abdicated their responsibility to adopt alternative means of police regulation, despite ample warning that they must do so.[131] *Bivens* itself is the paradigmatic case in which the Court had to act to protect Fourth Amendment rights because Congress had not done so. *Bivens* stands for the proposition, which Amar elsewhere holds dear, that *every* wrong deserves a remedy. The legislature will not act unless it perceives, at minimum, an ongoing pattern of violations.[132] The exclusionary rule, on the other hand, is predicated on the duty of the courts to remedy violations in every case before them.

Amar says that "proper methodology of constitutional criminal procedure does not blind itself to practical effects" (p. 154). Considering practical effects is never more important than when a highly respected scholar suggests real-world changes in criminal procedure to bodies with the power to change the law.[133]

3. *A Jury Is Willing to Compensate the Loss of the Right*

In his article "The Bill of Rights as a Constitution," Amar states that "the central role of the jury in the Fourth Amendment should remind us that the core rights of 'the people' were popular and populist rights — rights which the popular body of the jury was well suited to vindicate."[134] Although Amar also says that "the key role of the jury was to protect ordinary individuals against governmental overreaching,"[135] apparently he is using the word "ordinary" to describe individuals who were seeking to vindicate popular, majority rights, as opposed to the countermajoritarian rights he argues were not a core concern until the time of the Fourteenth Amendment.[136]

Even if we assume the correctness of Amar's colonial history, it tells us little about the role of the jury in our post-Fourteenth

130. *See* Steiker, *supra* note 5, at 835 (citing Amsterdam, *supra* note 52, at 378-79). *See also id.* at 848-49.

131. *See* Yale Kamisar, *Remembering the "Old World" Of Criminal Procedure: A Reply to Professor Grano*, 23 U. MICH. J.L. REFORM 537, 565 (1990) (recalling that during the 47-year period between Weeks v. United States, 232 U.S. 384 (1914), and Mapp v. Ohio, 367 U.S. 643 (1961), "*none* of the many states whose courts permitted the use of illegally obtained evidence developed an *effective* alternative safeguard"); Maclin, *supra* note 5, at 60.

132. *See* Meltzer, *supra* note 76, at 288-89.

133. *See id.* at 288-89 (detailing obstacles to legislative enactment of remedies against police misconduct).

134. Amar, *supra* note 7, at 1180.

135. *Id.* at 1183.

136. *See id.* at 1180.

Amendment, pluralistic society. Is Amar really arguing that the jury's role is to protect only popular majority rights against government overreaching, and to allow unpopular minorities to fend for themselves? To unpack this claim would take far more space than I have here, but that argument raises serious questions about both the nature of the Bill of Rights and the nature of the Constitution itself, not to mention the relevance of changing conditions to constitutional interpretation. As Carol Steiker points out, Amar describes the transformation of the First Amendment after Reconstruction from a protection for popular speech to a protection for unpopular speech. Why not bring the same recognition to the criminal procedure amendments?[137]

Reluctantly I must conclude that Amar really does believe that in the criminal realm, the role of the jury is to vindicate "popular rights" — an oxymoron, in my opinion. There is ample evidence of this throughout the book, such as his assertion that "the jury is perfectly placed to decide, in any given situation, whom it fears more, the cops or the robbers" (p. 44), or his assertion that "[w]hen rapists are freed, the people are *less* secure in their houses and persons" (p. 30). In the Fourth Amendment context, the dominant legal issue for the jury, under Amar's proposals, would be whether the police conduct was reasonable. The reasonableness calculus would permit the jury to balance, in each case, the importance of the law enforcement interest, the severity of the crime, the interests of the victims, as well as whom the jury fears more. The jury would make these decisions in light of its common sense.

As I said earlier, much is chilling about this formulation. Let us consider Amar's plan in light of his desire to advance the principle of equality. He asserts, "[I]n a variety of search and seizure contexts, we must honestly address racially imbalanced effects and ask ourselves whether they are truly reasonable" (p. 37). As I have discussed elsewhere, juries are made up of human beings whose common sense often allows them to empathize most closely with those who are most like them. "As for people from backgrounds — ethnic, religious, racial, economic — unlike [their] own, however, there is a pervasive risk that [their] ability to empathize will be inhibited by ingrained, preconscious assumptions about them."[138] Their notions of common sense also may permit them to assume that their

137. *See* Steiker, *supra* note 5, at 844-46. *See also* Amar, *supra* note 7, at 1150-52.

138. Bandes, *supra* note 63, at 399. *See also* ROBERT L. KATZ, EMPATHY: ITS NATURE AND USES 5-6 (1963); Michael Franz Basch, *Empathetic Understanding: A Review of the Concept and Some Theoretical Considerations*, 31 J. AM. PSYCHOANALYTIC ASSN. 101, 112 (1983); Heinz Kohut, *Introspection, Empathy, and Psychoanalysis*, 7 J. AM. PSYCHOANALYTIC ASSN. 459, 463 (1959).

assumptions and prejudices are factually based.[139] As Amar explicitly recognizes, jurors' fears may drive their decisions when criminal defendants are concerned. The Baldus studies demonstrated as much, and more — that these fears are often racially based.[140] Amar believes that the jury will sort out the innocent from the guilty and will despise only the guilty. Even apart from the simplistic notion of guilt and innocence this belief bespeaks, it also reflects an amazing faith that all those "we" care about will be on the right side of the scales.

4. *The Remedy for the Right Is Spelled Out in the Constitution*

The most ironic deviation from Amar's *Bivens* paradigm is his argument against the exclusionary rule on the ground that "[t]he text of the Fourth Amendment says nothing about criminal exclusion" (p. 107). As he puts it later: "This rule is, quite simply, not in our Constitution" (p. 150). This is the classic argument that proves too much. As Amar himself notes, the "only provision in the entire Constitution addressing the technical issue of remedies with any specificity" is the protection of habeas corpus (p. 106). Of course, none of the remedies he suggests in the Fourth, Fifth, or Sixth Amendment contexts is *in the Constitution* — not structural injunctions; or any kind of equitable relief; or the *Bivens* action, which has often been attacked on the same grounds;[141] or even judicial review itself,[142] much less a ten-percent sentencing discount for defendants with valid Fourth Amendment claims. I feel sure — given his prior scholarship — that Amar would not argue that the failure of the Bill of Rights to spell out specific remedies renders the first ten amendments merely precatory.

But my complaint really is not about Amar's inconsistency in claiming textual support for his arguments touting some implied remedies and trashing others. It is about the fact that asking for explicit textual support for particular remedies is directly antithetical to the holding and spirit of *Bivens*. Apparently, Amar would like to defend his allegiance to *Bivens* on the ground that *Bivens* holds in favor of a damage remedy. But if this is all *Bivens* says, it

139. *See* Angela P. Harris, *The Jurisprudence of Victimhood*, 1991 SUP. CT. REV. 77, 94-95; Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1027-29 (1988); Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322-23 (1987); *see also* Perlin, *supra* note 103, at 397.

140. *See* BALDUS ET AL., *supra* note 101; *see also* McCleskey v. Kemp, 481 U.S. 279, 291 n.7 (1987) (assuming arguendo the accuracy of the Baldus studies' statistical findings); Johnson, *supra* note 139, at 1019-21 (discussing what exactly Justice Powell accepted about the Baldus studies).

141. *See* Carlson v. Green, 446 U.S. 14, 35 (1980) (Rehnquist, J., dissenting); Bandes, *supra* note 114, at 312.

142. *See* Bandes, *supra* note 114, at 312-14.

does not say very much. Its more important point — that the remedy is not dependent on legislative enactment — is lost in Amar's analysis. As I have argued elsewhere, "requiring a clear statement of judicial . . . power . . . protects the political status quo from the possibility of judicial reform. It ratifies the choices of the powerful, and relegates the powerless to explicit legislative remedies they are unlikely to secure."[143] If the worth of the right depends on what is spelled out in the Constitution, on legislation, on jurors' common sense, and on congruence with common law, the dollar permitted by *Carey v. Piphus*[144] might be an optimistic assessment.

B. *Atomizing Constitutional Wrongdoing*

In this section, I argue that Amar's treatment of the criminal procedure amendments is flawed by his tendency to atomize the governmental misconduct at issue. I first discuss Amar's atomistic portrayal of the constitutional wrongs themselves. Specifically, I discuss the ways in which Amar disaggregates complex chains of governmental misconduct, portraying them as a series of discrete, individual acts connected by simple, mechanistic causal links. Second, I argue that the atomistic view of wrongs leads to an atomistic view of the proper remedies. The view of wrongs as discrete rather than interconnected is consistent with narrow notions of what is preventable, with an emphasis on damage actions, and with a somewhat jaundiced attitude toward the concept of the private attorney general. I examine each of these remedial notions.

The tendency to atomize governmental conduct is common enough,[145] but its appearance in Amar's jurisprudence is surprising and inconsistent. In *Of Sovereignty and Federalism,* Amar makes an eloquent case for enterprise liability. His "first principle" in those pages is the maxim that where there is a right, there should be a remedy.[146] He explains that individual liability is often an inadequate remedy for government wrongdoing for a number of reasons, such as the fact that "[p]ervasive and systematic illegality will not always be traceable to specific individuals who can be called to account" and the fact that "the governmental entity will often be in a far better position than any individual officer to restructure official conduct in a way that avoids future violation of rights."[147] Amar's strong position for enterprise liability, and the reasoning he uses to advance it, suggest to me not only that he places a high value on

143. *Id.* at 314.

144. 435 U.S. 247, 266-67 (1998).

145. *See* Susan Bandes, *Narrative Coherence and the Anecdotal Turn: Stories of Police Brutality* (manuscript on file with author).

146. *See* Amar, *supra* note 105, at 1485-86. *See also* p. 41.

147. Amar, *supra* note 105, at 1487-88.

government accountability, but also that he recognizes the complex ways in which individuals can act together to create systemic misconduct and the importance of deterrence to systemic reform.

On a particularized and literal level, Amar's proposals for reforming criminal procedure in *First Principles* are consistent with his proposals in the earlier article. Amar consistently argues for injunctive and damage actions, coupled with enterprise liability. But here again the generous and protective spirit that animates the earlier work is transformed when the criminally accused are the beneficiaries. The larger insight of enterprise liability — that compensating each individual may not constitute full remediation when government is the wrongdoer — is lost.

1. *Atomizing Governmental Wrongs*

Amar defines governmental wrongs atomistically and narrowly. Amar's earlier insights about the ways in which pervasive and systemic illegality occur are hard to find in this arena. Here, instead, he is much more likely to view systemic conduct as a series of isolated instances. To begin, he views police conduct as a series of discrete, unconnected acts as opposed to part of a causal chain. He finds the search of the white powder in *Jacobsen*[148] or the dog sniff in *Place,*[149] for example, to be reasonable because he is willing to see them as discrete acts, with no connection to the intrusive searches and seizures that often follow at their heels.[150] He argues that physical fruits of compelled confessions ought to be admissible, because he makes little connection between the illegal interrogation and the later discovery of its fruits. As Kamisar says, Amar focuses "exclusively on the last step of a multistep course of action by the police."[151] As I argue above, this focus can be explained, at least in part, by his lack of interest in process values and by his overriding concern for his bottom line: the accuracy of the conviction.

In addition, Amar's attitudes toward causation shed light on his unwillingness to see linkages. Consider his attitude toward the fruit-of-the-poisonous-tree doctrine. Amar takes issue with the doctrine because it would engender a "causation gap." In other words, it raises the possibility that suppression might occur in cases in which the primary illegality was not a but-for cause of the introduction of its fruits into evidence.[152] Based on the possibility of

148. 446 U.S. 109 (1984).

149. 462 U.S. 696 (1983).

150. *Cf.* Kamisar, *supra* note 5, at 960.

151. *Id.*

152. The two examples he gives of evidence excludable because of a causation gap, *see* pp. 26-27, would both be admissible under current exceptions to the exclusionary rule: the good faith and independent source exceptions.

such situations, he would jettison the fruit-of-the-poisonous-tree doctrine. This reasoning is unconvincing. The disagreement cannot really be about the mechanics and proof of but-for causation.[153] As Justice Andrews explained in his dissent in *Palsgraf,*[154] the length of the causal chain depends on what social goals we want to accomplish. In early exclusion decisions like *Silverthorne,*[155] the Court wanted to preserve the integrity of the courts by ensuring proper routes for review of evidence. In later decisions like *Wong Sun,*[156] the grounds for the poisonous tree doctrine had shifted, and the Court was concerned about deterring future police misconduct — up to a point. Though *Wong Sun* is premised on the assumption that *but for the initial illegality,* the subsequent evidence would not have been obtained, the doctrine itself sweeps less broadly than would a but-for test.[157] Yet it is still too broad for Amar's taste. He prefers to assume that, somehow, the truth will come out, justice will reign (pp. 26-27), and the causal link will not be provable. Amar says, "Consider . . . the nice-sounding idea that government should not profit from its own wrongdoing. Our society, however, also cherishes the notion that cheaters — or murderers, or rapists, for that matter — should not prosper" (p. 26). The questions are, how much are we willing to trade to try to ensure that cheaters, murderers and rapists will not prosper? And when we have traded away so much that it interferes with our own prosperity and dignity, will there still be time to turn things around?

As I discussed earlier, one of the values Amar is too willing to trade away is judicial integrity. Amar's "causation gap" discussion is another example of his proclivity for atomizing conduct. He will not make the causal link between police misconduct and the introduction of the fruits of crime in court. On a purely descriptive level, he approaches the integrity of the judiciary as if it floats free from the actions of other governmental entities — as if what happens on the street has no bearing on what happens in the courtroom. This approach is problematic not only because it views the court's integrity so narrowly, but also because of its implications for the deterrence rationale. Naturally, once one rejects the causal link between the introduction of evidence at trial and the improper

153. Amar admits as much when he says "even if a defendant could conclusively establish but-for causation, the bloody knife should still come in as evidence." P. 27.

154. Palsgraf v. Long Island R.R., 162 N.E. 99, 104 (N.Y. 1928) (Andrews, J., dissenting).

155. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

156. Wong Sun v. United States, 371 U.S. 471 (1963).

157. In *Wong Sun,* the police made a concededly illegal entry into the sleeping quarters of Toy. The police reaped several fruits from this entry, including narcotics and Wong Sun's confession. The Court recognized that Wong Sun's confession would not have been obtained had it not been for the illegal entry. Nevertheless, it found that, due to intervening circumstances, the confession was sufficiently attenuated from the initial illegality that police could not have predicted it at the time they entered Toy's residence. 371 U.S. at 491.

gathering of that evidence, exclusion will not seem like an effective way of deterring the police.

2. *Remedial Implications*

Amar uses a combination of current doctrine and proposals for reform to disconnect police misconduct from what occurs in court. For example, Amar thoroughly approves of the Court's current holding that a Fourth Amendment violation is complete at the time of the search or seizure, not when the evidence is introduced at trial.[158] Conversely, although the Court finds that the Fifth Amendment violation *does* occur when the confession is admitted at trial (p. 24), Amar suggests that we "enforce the clause itself by excluding confessions and allowing fruits" (p. 61). In the real world, the theoretical debate about when the violation is complete seems singularly unhelpful. As to all police investigative techniques, whether limited by the Fourth, Fifth, or Sixth Amendments, or some combination of the three, a judicial open door policy creates obvious incentives for police.

a. Deterrence. Amar ignores the evidence that police think about admissibility when performing searches and seizures as well as when eliciting confessions.[159] He makes the point that police conducting *Terry* stops to keep the peace will not be deterred by the threat of exclusion (p. 157). But he says little about the converse point — that police usually conduct seizures, searches, and confessions in order to gain admissible evidence leading to a conviction. Police, "engaged in the often competitive enterprise of ferreting out crime,"[160] are generally willing to conform to rules rather than lose evidence and convictions, but they cannot be expected to ignore gaping loopholes and incentives to cut corners.

Recall the reaction to *Mapp*[161] by urban police departments like New York and Los Angeles, who argued that with the advent of the exclusionary rule, they would for the first time have to begin following the dictates of the Fourth Amendment.[162] The rule deters, and disconnections between rule and remedy[163] decrease deterrence.[164]

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158. P. 151 (discussing United States v. Leon, 468 U.S. 897, 905-06 (1984)).

159. *See infra* notes 161-67 and accompanying text.

160. Johnson v. United States, 333 U.S. 10, 14 (1948).

161. Mapp v. Ohio, 367 U.S. 643 (1961).

162. *See* Kamisar, *supra* note 26, at 43; Yale Kamisar, *The Exclusionary Rule in Historical Perspective: the Struggle to Make the Fourth Amendment More Than 'an Empty Blessing,'* 62 JUDICATURE 337, 347-48 (1979).

163. *See* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers,* 94 MICH. L. REV. 2466, 2532-51 (1996) (discussing the concept of "acoustic separation").

164. Amar claims that the rule both overdeters, by preventing any use of tainted evidence, even if it might have come to light anyway, and underdeters, by permitting police to

If police want a confession, they may be willing to risk an illegal arrest since they can "cleanse" the illegality by transporting the suspect to the station to interrogate him.[165] Susan Klein talks about the Tucson Police Department's practice of interrogating suspects in violation of *Miranda* because they believed "that such statements might be held voluntary and thus could be used to impeach the defendant, to keep him off the stand, or to deprive him of an insanity defense."[166] *United States v. Payner*[167] is a classic example of the knowing and cynical use of standing doctrine to insulate an illegal search from challenge and ensure that its fruits will be admissible. Theoretical distinctions about when the violation is complete fail to describe the complex interaction of multiple players using a variety of investigative techniques.

Of course, Amar does recognize that police departments at times need systemic reform. His arguments for enterprise liability are powerful (p. 41), although it should be noted that once his substantive reforms were adopted, police departments would not be liable for all that much — mostly whatever a jury was willing to find unreasonable. But even as he takes Professor Stuntz and others to task for acting "as if the choice is tort law *or* exclusion" (p. 157), Amar demands a choice — tort law and enterprise liability *instead* of exclusion. What, then, is the problem with exclusion? Why is tort law, of all things, more desirable?

b. Damages. Building on his assumption that the wrongs are discrete and unconnected, and look like private law wrongs, Amar argues that damages are a logical remedy. If the police officer was wrong to coerce a confession from the defendant, but there are no causal links among the interrogation, the actions of other officers in seizing its fruits, and the action of the court in introducing those fruits, then we are not dealing with a complex web of governmental

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hassle people from whom they expect to find no evidence. P. 157. The overdeterrence argument seems to ignore the significant limits the Court has placed on the exclusionary rule since *Mapp. Nix v. Williams,* 467 U.S. 431 (1984), for example, permits the use of tainted evidence if it would have come to light absent the illegality. The underdeterrence argument has some truth to it; the exclusionary rule does not effectively deter police from hassling people in situations not likely to lead to evidence. But this observation does not support Amar's argument against the rule. First, Amar's proposals, such as damage actions, would be equally ineffective at deterring hassling. *See supra* note 125 and accompanying text. Second, if effective remedies for police hassling did exist, they could exist in tandem with the exclusionary rule, rather than replace the rule. *Cf.* Meltzer, *supra* note 76, at 184-85 (discussing overdeterrence and underdeterrence objections).

165. *See* New York v. Harris, 495 U.S. 14 (1990); Steiker, *supra* note 163, at 2517.

166. *See* Susan R. Klein, Miranda *DeConstitutionalized: When the Self-Incrimination Clause and the Civil Rights Act Collide,* 143 U. PA. L. REV. 417, 441 & n.98 (1994). *See also* Jan Hoffman, *Police Tactics Chipping Away at Suspects' Rights,* N.Y. TIMES, March 29, 1998 at 1 (reporting that in California, many police departments train officers that they have "little to lose and much to gain" by continuing to interrogate suspects despite invocation of *Miranda* protections).

167. 447 U.S. 727 (1980); *see also supra* note 14 and accompanying text.

misconduct, but simply a single wrongdoing officer. Why should he not simply be assessed damages, as if he were an ordinary batterer or trespasser?

The problems with this formulation are both symbolic and highly pragmatic. As I discussed above,[168] a tort judgment against an officer who is treated like a tortfeasor is not the same as a judgment that a governmental official violated one's constitutional rights.[169] Symbolically, the tort judgment fails to provide the "[a]ffirmation of the . . . [r]ights"[170] that the plaintiff is seeking and that permits the development of constitutional precedent. Practically, damages have not been shown to be an effective way of deterring or reforming a governmental entity.[171]

Amar argues that damages are needed in situations in which "a constitutional violation has already occurred *out of court* [so that] a court cannot really prevent it" (p. 116). This formulation speaks volumes about Amar's views on prevention and deterrence. Because he atomizes conduct so habitually, he has an extremely narrow idea of what can be prevented. If the police officer is not influenced in his behavior by whether his coerced confession or illegally seized contraband will be admissible at trial, then the officer's conduct cannot be prevented by threatening to exclude the evidence. But in "[r]eal life" (p. 9), the officer is influenced by exclusionary sanctions, and his conduct is therefore preventable. The admission of the evidence constitutes judicial default and judicial *encouragement* of illegality. It places the government's imprimatur on illegally obtained evidence in the case at bar, and it sends street-level officers the unmistakable message that such evidence is also welcome in future cases.[172]

c. The Private Attorney General. Amar recognizes that the criminal defendant is meant to be a sort of private attorney general but argues that he is "the worst kind" (p. 28). He is self-selected,

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168. *See supra* text accompanying notes 116-27.

169. *See Bivens*, 403 U.S. at 408-09 (Harlan, J., concurring); Monroe, 365 U.S. at 180; *see also* Dellinger, *supra* note 114, at 1537-39; *supra* text accompanying notes 116-23.

170. Christina Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 52 (1980) (discussing the importance of affirmation of the right); *see also* Susan Bandes, Monell, Parratt, Daniels, *and* Davidson: *Distinguishing a Custom or Policy from a Random, Unauthorized Act*, 72 IOWA L. REV. 101, 124 (1986).

171. *See* PETER SCHUCK, SUING GOVERNMENT 104 (1983); Bandes, *supra* note 170, at 120-27; Whitman, *supra* note 170, at 42.

172. *See* Arnold Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1267 (1983) ("[I]t defies logic to believe that a policeman's willingness to search without probable cause or a warrant (and therefore possibly subject an innocent person to an unjustifiable intrusion of privacy) is unrelated to whether he can gain any admissible evidence from conducting the search."); *see also* Milton A. Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 UMKC L. REV. 24, 39 (1980) (arguing that the police "have great difficulty believing that standards can have any real meaning if the government can profit from violating them").

self-serving, unrepresentative of law-abiding citizens, often despised by the public, unsophisticated, and focused only on exclusion, and he "rarely hires the best lawyer" (p. 28). The exclusionary rule rewards him "precisely because he is guilty" (p. 156).

I wonder how many of these arguments Amar would countenance in a noncriminal context. His criticism of the defendant has a number of odd features, for example. The ideal plaintiff usually is described as someone who will litigate the case strenuously, has concrete facts to litigate, and is in an adversarial position toward the opposing party.[173] In all these regards, the criminal defendant seems to fit the bill. He certainly is adverse to the state, which seeks to convict and imprison him. He has a ripe case replete with concrete facts, and harm that is certain to occur if he loses. His motivation to litigate the case strenuously is his desire for liberty — an impeccable motive at least as good as the pecuniary and property interests the Court prefers.[174]

Amar would prefer litigants like those "the NAACP sought out . . . to revive the equal protection clause . . ." (p. 28). I agree with him that ideological zeal can make for a good plaintiff,[175] although he and I have the weight of Supreme Court precedent against us in this regard.[176] But is it either necessary or workable to ask plaintiffs in precedent-setting cases to be motivated primarily by altruism? In Mark Tushnet's book, *Making Civil Rights Law,* he recounts that when the NAACP Legal Defense Fund was mounting its legal attack on restrictive covenants, it often represented plaintiffs who were largely motivated by the desire to acquire a family home.[177] In my own experience at the ACLU, I found my clients were motivated by a variety of complex motives, which could not be neatly separated into the self-serving and the altruistic. Would Amar suggest a litmus test for unselfish ideological commitment when a Title VII plaintiff sued to get her job back, or a Nazi sued because he could not get a parade permit, or a victim of police brutality sued for a large monetary award? Is it necessary to ask whether altruism was Webster Bivens's primary motivation for suing? Moreover, if altruism is the standard, it seems to comport

173. *See* Allen v. Wright, 468 U.S. 737 (1984); Warth v. Seldin, 422 U.S. 490 (1975); Susan Bandes, *The Idea of a Case,* 42 STAN. L. REV. 227, 258-64 (1990).

174. Notice that being "self-serving" in Amar's terms is not very different from being a plaintiff with a concrete stake in the outcome and the requisite adversarial zeal.

175. *See* Bandes, *supra* note 173, at 258-63.

176. *See Wright,* 468 U.S. at 751-56 (rejecting ideological motivations as a source of standing); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 219 (1974).

177. *See* MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW 86-96 (1994); *see also Truth-Telling on Race,* THE NATION, Dec. 15, 1997, at 3 (recounting Thurgood Marshall's struggle to represent plaintiffs "more interested in acquiring a family home than in advancing civil rights through a test case").

poorly with Amar's preferred tort vehicle, which provides only money damages as a remedy.

What of Amar's claim that the criminal defendant is the "worst kind" of private attorney general because he is unsophisticated and cannot afford the best lawyer? On its face, this assertion is highly questionable. Even apart from those who can afford the Johnny Cochrans and Barry Schecks who litigate strenuously in criminal cases, criminal defendants have the right to representation by the public defender's office — a group of lawyers with a high level of expertise in criminal matters.[178] In any case, in what other legal field would Amar require a litigant to be sophisticated and flush enough to afford expensive representation? Is he really suggesting a standard whereby precedent should be made by those who can afford the best lawyers, rather than those who themselves possess the characteristics of good plaintiffs?

Amar's attitude toward private attorneys general in the criminal context is ambivalent at best. He likens the exclusionary rule to playing the "Leavenworth lottery," which he describes as: "Because the government violated the constitutional rights of A, judges spin the wheel and spring some lucky (but unrelated) convict B from Leavenworth" (pp. 151-52). But in a sense, what he describes here *is* the private attorney general mechanism, which permits A to make law that will also affect unrelated B. Indeed, it also describes a number of other mechanisms for judicial norm creation and enforcement, including injunctive relief, the overbreadth doctrine, the *Bivens* remedy, class action suits, and the very act of setting precedent which will bind future litigants.[179] It would be difficult to find a case in which only A was affected, though such a case would more likely be a private law matter than one in which constitutional issues were litigated. I do not think Amar's objection is really directed at most private attorneys general, but at "convicts" who get "lucky" and are sprung from prison.[180]

Amar's complaints about criminal defendants as private attorneys general are not, I think, importable to noncriminal contexts. The key phrases here are that the defendant is "despised by the public," "unrepresentative of the larger class of law-abiding citi-

178. *See, e.g.*, People v. Robinson, 402 N.E.2d 157, (1979) (refusing to adopt a per se rule against appointment of the public defender when another member of the same office has a conflict with the case). The Illinois Supreme Court said, "In many instances the application of such a *per se* rule would require the appointment of counsel with virtually no experience in the trial of criminal matters, thus raising, with justification, the question of competency of counsel." 402 N.E.2d at 162.

179. *See* Bandes, *supra* note 173.

180. If the exclusionary rule is not constitutionally based — an assumption I reject, *see* Bandes, *supra* note 114, at 336 n.225 — then not only is the Leavenworth lottery illegitimate, but so is the Court's attempt to make the rule binding on state actors.

zens," and rewarded "precisely because he is guilty" (pp. 28, 156). The complaint is really the familiar one — the true first principle of Amar's book — that criminals should not walk. But people who are despised are often precedent-setting litigants — witness the prevalence of Jehovah's Witnesses and communists in the United States Reports.[181] Some might be rightly despised, such as Nazis and racists,[182] and some might be wrongly despised. Some of the wrongly despised are lawbreakers — like Hardwick,[183] or Baird,[184] or Shuttlesworth.[185] The dividing lines are not as clear as Amar implies. He apparently does truly believe that he can draw a circle around "We the People" and shut others out;[186] that inside the circle are those "good" colonial lawbreakers like John Peter Zenger, William Penn and John Wilkes, and all the rest of us who deserve to be safe in our houses, papers, and effects; and that outside the circle are the bad guys who should be denied protection to the fullest extent possible without infringing on the rest of us.

CONCLUSION

In a lecture he gave in 1994, Amar offered five lessons about the Bill of Rights, and about communicating the teachings of the Bill of Rights. The lessons were entitled: (1) keep it simple; (2) find the big idea; (3) tell a story; (4) connect the dots; and (5) remember the People.[187] In *First Principles,* Amar has had mixed results in living up to these lessons. He has told a simple, powerful, and understandable story about the criminal procedure amendments — one which "will be comprehensible to ordinary citizens"[188] and scholars alike. He has centered it around a big idea, or group of core concepts, about the rights involved. He has done so "in a way that others may learn from or clearly take issue with."[189] On all these

181. *See* Wooley v. Maynard, 430 U.S. 705 (1977) (involving Jehovah's Witnesses); Yates v. United States, 354 U.S. 298 (1957) (considering Communists); Dennis v. United States, 341 U.S. 494 (1951) (involving Communists); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (regarding Jehovah's Witnesses); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (involving Jehovah's Witnesses); *see also* Fredrick Schauer, *Slippery Slopes,* 99 HARV. L. REV. 361, 377 (1985) (observing that free speech claims are often brought by members of unpopular groups like Hare Krishnas and Jehovah's Witnesses, and by "the wicked," such as Nazis and the Ku Klux Klan).

182. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (involving a member of the Ku Klux Klan).

183. *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

184. *See* Belloti v. Baird, 428 U.S. 132 (1976).

185. *See* Shuttlesworth v. Birmingham, 394 U.S. 147 (1969).

186. *See* Nomi Maya Stolzenberg, *"He Drew a Circle That Shut Me Out": Assimilation, Indoctrination and the Paradox of a Liberal Education,* 106 HARV. L. REV. 581 (1993).

187. *See* Amar, *supra* note 83, at 585-86.

188. *Id.*

189. *Id.*

grounds, he has succeeded admirably. But I do not believe he has connected the dots. Amar says the Constitution is not a grab bag of separate, unrelated clauses, but a central weakness of his analysis is that he does reserve these three amendments for separate treatment, despite his protestations to the contrary. His treatment of these amendments, and the protections they afford, is inseparable from the other weaknesses in his book. The story he tells is too simple. It sacrifices the complexity of governmental conduct and the play of competing societal forces for a clean narrative line whose very simplicity is dangerous — because it confirms fears and prejudices that thrive on oversimplification. The most dangerous oversimplification of all is his failure to heed his own admonition to "remember the people." He does not see that "We the People" includes us all.